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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. W. S. Kennedy, plaintiff in error,
v.
FREDERICK W. BECKER, SHERIFF OF ERIE County.
No. 66

BRIEF FOR THE UNITED STATES.

The facts are stated in full in the brief for the plaintiff in error. For convenience of the Court, however, the so-called Hartford Convention, the treaty of the Big Tree or Genesee [1] (7 Stat. 601), and the pertinent provisions of the Indian intercourse act of May 19, 1796 (1 Stat. 469), are set forth in Appendix A (p. 21), Appendix B (p. 32), and Appendix C (p. 42) of this brief.

In 1786, and long prior thereto, the States of New York and Massachusetts both claimed the ultimate right of soil and sovereign jurisdiction in and over the lands, then occupied by the Seneca and other

[1] As printed in the Statutes at Large, the document is incomplete. The original on file in the State Department has prefixed to it the language of the President proclaiming the treaty and a notation or indorsement at the end, signed by him, evidencing its ratification, etc. The completed instrument is printed in full in the appendix, including certificates of its execution, by a master in chancery in New York and a notation of its recordation in the secretary's office of the State. A certified copy of the complete instrument is produced here for the inspection of this court.

Indians, which lie within the present boundaries of the State of New York. In that year, by the Hartford Convention so-called, the controversy was settled as between the two States in the following manner: New York quitclaimed to Massachusetts the ultimate title to the soil subject to the Indian right of occupancy—the "preemptive right," as it was then styled. Massachusetts relinquished to New York all rights of sovereignty and jurisdiction over the lands. Thereafter Massachusetts sold to Robert Morris its "preemptive right." The Constitution of the United States having been adopted, the Seneca Nation "at a full and general treaty" held September 15, 1797, by a commissioner representing the President, agreed to cede a part of their lands, including the locus of the offense alleged in this case, to Robert Morris. The money consideration was $100,000, and was to be invested in stock of the Bank of the United States, issued to the President, to be held by him for the use and benefit of the Indians. The treaty was embodied in a document which styles itself an "indenture." By this document the Indians conveyed part of their lands, by metes and bounds, description, reserving absolutely certain tracts within the boundaries, and further reserving fishing and hunting rights in the following language:

> * * * also excepting and reserving to them the said parties of the first part and their heirs the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed.

On December 12, 1797, the Senate gave its

> advice and consent to the ratification of the treaty * * * as soon as the President shall be satisfied that the investment of the money has been made conformably to the intention of the said treaty. (Executive Journal of the Senate, edition of 1828, vol. 1, pp. 254–255.)

At the foot of the original document, on file in the State Department, and over the signature of President John Adams, appears the following, under date of April 11, 1798:

> Now be it known that I John Adams, President of the United States of America, having seen and considered the said convention or treaty and being satisfied that the investment of the money therein mentioned, has been made conformably to the intention of the said convention or treaty, do by and with the advice and consent of the Senate, accept, ratify and confirm the same, and every clause and article thereof.

I.

The clause of the treaty relating to fishing and hunting rights is to be construed as reserving to the Indians a free and perpetual right to take fish and game on the lands ceded, at least for their own subsistence and by the means and methods then known and practiced by them.

> The language used in treaties with the Indians should never be construed to their prejudice. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction. (Con-

curring opinion of Mr. Justice Johnson in *Worcester* v. *Georgia*, 6 Pet., 515, 581.)

This rule, reiterated again and again in varying forms of expression and applied in numerous cases by this Court, has become fundamental in the construction of Indian treaties.

The Kansas Indians, 5 Wall., 737, 760.

The Choctaw Nation v. *United States*, 119 U. S., 1, 27, 28.

Jones v. *Meehan*, 175 U. S., 1, 11.

United States v. *Winans*, 198 U. S., 371, 380.

Northern Pacific Ry. Co. v. *United States*, 227 U. S., 355, 362, 367.

In *Winters* v. *United States*, 207 U. S., 564, this court, by implication from the attendant circumstances, read into a treaty with certain Montana Indians a far-reaching provision in their favor relating to a matter upon which the treaty itself was wholly silent. In *Jones* v. *Meehan*, *supra*, and the long series of cases there reviewed by this Court, it was held that treaties ceding lands to the United States and reserving specific tracts to individual Indians operate, not merely upon the right of occupancy, but, by *implication*, convey the fee from the Government to the Indian.

In the treaty of Big Tree there is no patent ambiguity. It contains words of perpetuity certainly binding on the white men. It was made at a time when restrictive game laws, even for the whites, were practically unknown in this country. No Government at that time had attempted to control

the Indians as to the means, methods, or times of taking fish and game. Their hunting and fishing in their own territory was free and unrestricted, unless regulated and controlled by their own customs. They were dealing only with the United States and, through the United States, with Robert Morris. To say that they understood, or must be held to have understood, that a third party, namely, the State of New York, might on the next day or at any time in the future, by restrictive or prohibitive game laws, deprive them of all the substantial benefits of this term of the treaty, is to reverse the rule of interpretation, invert the mental processes of this Court in *Winters* v. *United States, supra,* and *by implication* hold the Indians to a knowledge and acceptance of remote legal and constitutional relations of which they were in fact entirely ignorant.[1]

It seems clear, therefore, that the *meaning* of this reservation, whether enforcible as against the State of New York or not, was that the Indians were to retain a perpetual right of free hunting and fishing on the lands sold; so far, at least, as the exercise of that right should not interfere with the improvements and cultivation of future settlers thereon. As to these, no doubt, their experience of the advance of settlement and cultivation was such that they may reasonably be said to have had them in contemplation.

The real question, therefore, is one of the constitutional powers of the State and Nation, respectively.

[1] See especially speech of Red Jacket, a Seneca Chief, quoted in Appendix D, infra p. 43.

II.

The Seneca and other New York tribal Indians are wards, not of the State, but of the United States.

To the claim of New York, that the Seneca and other Six Nation Indians are wards of the State and subject to her legislation both on their reservations and on the lands ceded, the case of *Worcester* v. *Georgia*, 6 Pet., 515, is a complete answer, unless there is something in the history of these tribes that places them in a wholly different position from that occupied by the Cherokees in Georgia. The argument that there is such a difference received its latest and strongest expression by Mr. Justice Andrews of the New York Supreme Court, at a trial term in 1914 (*George* v. *Pierce*, 85 Misc., 105). It is sufficient to say that the expressions and alleged acts of submission to the King, the Duke of York, and the Colony of New York, there relied on, are substantially of the same general character as the expressions of submission and dependence vainly urged on behalf of Georgia in the *Worcester case*. And even if it were conceded (and it is not) that New York by reason either of these historical facts, or the relinquishment of Massachusetts, had some special jurisdiction over these Indians prior to 1789, that jurisdiction necessarily passed to the Federal Government on the adoption of the Constitution. Massachusetts could transfer no greater jurisdiction than she then had, and whatever she conferred upon New York was subject to the constitutional redistribution of sovereign powers.

In any event, the United States, both before and after the adoption of the Constitution, has repeatedly made treaties with Six Nation Tribes. This Court has enforced those treaties, as the supreme law of the land, against the State, and against private parties claiming under the State, and has expressly declared that the New York Indians are the wards of the Nation.

The New York Indians, 5 Wall., 761.

Fellows v. *Blacksmith*, 19 How., 366:

> * * * the treaty [of 1838] was to be carried into execution by the authority or power of the Government, which was a party to it; and more especially, when made with a tribe of Indians who are in a state of pupilage, and hold the relation to the Government as a ward to his guardian (p. 371).

The political branch of the Federal Government is now actively exercising guardianship over these Indians. They are now in charge of an Indian agent of the United States (Rec., p. 4).

Finally, the question has been conclusively set at rest, so far as the New York courts are concerned, by a decision from which there was no dissent, rendered by the Court of Appeals June 16, 1914 (*People ex rel Cusic* v. *Daly*, 212 N. Y., 183). There it was held that the Federal statute of 1885 (23 Stat. 385), providing *inter alia* for the trial by the Federal courts of certain crimes committed on Indian reservations "within the boundaries of any State of the United States" is applicable to the New York Indians, and

deprives the State courts of jurisdiction over such crimes.

After referring to the opinion of Mr. Justice Andrews in *George* v. *Pierce, supra,* the court said:

> As bearing upon the question whether the New York Indians are to be regarded as the wards of the Nation or of the State, we think there was no less reason for placing them under the protectorate of the Federal Government than there was for extending it to the other tribes resident in any of the original thirteen colonies. (P. 192.)

Again:

> The Indians, although native sons of our soil, are not citizens either of the Nation or State. They are heralded as the wards of the Nation, and in their collective or tribal capacity they have been relegated to the status of foreign nations with whom the Federal Government has entered into treaty relations. This anomaly has been accentuated by the State legislation and treaties which, from time to time and in various ways, have indicated the purpose of the State to subject the Indians within our borders to the control of our laws and the jurisdiction of our courts. The fact remains, however, that Congress has always asserted and exercised the right to legislate in all Indian affairs, and its power to do so has been upheld by the Supreme Court in a case involving the very statute now under consideration. (*United States* v. *Kagama,* 118 U. S., 375, 384.) (P. 196.)

III.

The hunting and fishing rights involved are a part of the original Indian rights of occupancy, reserved in the very instrument of cession, never relinquished, and continuously held under the ancient Indian title. The locus in quo, therefore, always remained an Indian reservation pro tanto.

This reservation of ancient rights distinguishes this case from *Ward* v. *Race Horse*, 163 U. S., 504, and brings it within *United States* v. *Winans*, 198 U. S., 371. The transaction was simply a grant of certain interests in land, with a reservation to the grantors of other interests which they chose not to sell; analogous to a conveyance by a private owner with reservation of rights of way. The Indians do not hold of or under Robert Morris, or the United States, or the State of New York; for none of these ever had or owned the rights involved. Morris was satisfied to buy an incomplete title, and the United States, through its agent, consummated the transaction for him. New York did not object, and her rights and jurisdiction were in nowise diminished thereby. In fact, her jurisdiction and police powers were extended over new territory—as to the whites for all purposes and as to the Indians, for all purposes except the power to control them in hunting and fishing, in accordance, at least, with their ancient customs and for purposes of their own subsistence.

New York, therefore, can not regulate the Indians in their hunting and fishing on the lands in question unless she possessed the power to so

control them on their reservation before the cession. This, as has already been shown, she could not do. She could not extend her general system of laws over the reservations (*Worcester* v. *Georgia*, *supra*); she could not tax the reservation lands, or, through her courts, eject the Indians from any part of them, even after an unqualified cession, so long as the Indians remained in the actual occupancy thereof (*The New York Indians* and *Fellows* v. *Blacksmith*, *supra*). There is nothing peculiarly sacred in State control over fish and game; and in the West, applying the fundamental principle of the three cases last above cited, the courts have expressly held that State fish and game laws can not be enforced against Indians on their own reservations. (*In re Blackbird*, 109 Fed., 139; *In re Lincoln*, 129 Fed., 247; *State* v. *Campbell*, 53 Minn., 354.)

IV.

The reserved rights of hunting and fishing are secured to the Seneca Indians by the word of the United States given at a public treaty, which is the supreme law of the land.

The instrument embodying the treaty of Big Tree is styled an indenture. But this Court looks at the substance and not merely at the form. The document recites the holding of a treaty "under the authority of the United States" by "the Hon. Jeremiah Wadsworth, Esq., a commissioner appointed by the President of the United States to hold the same in pursuance of the Constitution and the act of the Congress"; and it embodies the terms there agreed upon.

Under the law then and ever since in force, no private individual or State could purchase Indian lands except at a "treaty or convention entered into pursuant to the Constitution" of the United States. It was a misdemeanor punishable by fine and imprisonment in any person "not employed under the authority of the United States" to treat with an Indian or Indian tribe for the purchase of lands. It was lawful, however, for an agent of a State to be present at a "treaty held with Indians under authority of the United States," and "in the presence and with the approbation" of the United States commissioner to "adjust with the Indians the compensation to be made for their claims to land within such State which shall be extinguished by treaty." (Act of May 19, 1796, sec. 12, 1 Stat., 469, Appendix, p. 42.)

A treaty, therefore, made in conformity with this statute and ratified by the Senate was, as the statute itself declared, a treaty or convention "entered into pursuant to the Constitution" and a treaty "held with Indians under authority of the United States." And the Constitution declares that "all treaties made under authority of the United States shall be the supreme law of the land."

It can be of no consequence, therefore, that this instrument contains no *express* stipulations or guaranties by the United States. The consideration for the cession was twofold—the payment of $100,000 to be invested in stock of the Bank of the United States and held in the name of the President "for the use and benefit of said nation of Indians," and the right

to hunt and fish upon the ceded lands according to the true intent of the reservation clause. The obligation of the United States to see that the money was paid and so invested was performed by the President, as we have seen, but there was a continuing obligation to administer the fund for the benefit of the Indians. Is it conceivable that the faith of the United States was not also pledged to see that the Indians should receive the other branch of the consideration, which could be enjoyed only in the future? Could the Indians possibly have had any other thought? Could President Adams have believed otherwise when he wrote at the foot of the treaty:

> I * * * do, by and with the advice and consent of the Senate, accept, ratify, and confirm the same, and every clause and article thereof.

Indian treaties have the same constitutional sanction and supremacy as do treaties with foreign nations. It has been expressly so declared by this Court of a treaty made with New York Indians *Fellows* v. *Blacksmith* (19 How., 366, 372). It would be a work of supererogation to refer to the numerous cases in which this and other courts have given effect to such supremacy.

To say that fish and game laws are enacted in the exercise of police powers does not help the position of the State. There is nothing sacrosanct about State police powers. They are nowhere described or defined in the Constitution. The powers conferred upon the Federal Government are specified and enumerated. Those residing in the State are not; they

include only powers remaining after those granted and those prohibited have been carved out of the total sovereignty. State police laws must yield when clearly in conflict with the prohibitions of the Constitution (*Eubank* v. *Richmond*, 226 U. S., 137) or with Federal laws or treaties passed or made in the exercise of powers clearly granted (*Sligh* v. *Kirkwood*, 237 U. S., 52, 58; *Geoffrey* v. *Riggs*, 133 U. S., 258, 266–7). The fishing wheel, involved in *United States* v. *Winans* (198 U. S., 371), was maintained under State police laws, for the granting of the license for its operation was both a regulation of fishing and a revenue measure.

The United States may, by treaty, continue in force its legislation forbidding the sale of intoxicating liquors to Indians, even upon lands which have been ceded and patented to whites under the townsite laws. *Dick* v. *United States*, 208 U. S., 340. See also *Johnson* v. *Gearlds*, 234 U. S. 422. And Federal legislation may continue in force after the Indian lands have been allotted in severalty and are held under trust patents, although the Indians have become citizens of the States. *United States* v. *Pelican*, 232 U. S., 442, 447, and cases there cited; *Perrin* v. *United States*, 232 U. S., 478. It can not be denied that these exertions of Federal power abridged the free exercise of their ordinary police power to control the sale of intoxicating liquors by the States concerned. Those authorities are applicable here, for the power of the United States over Indian relations does not depend upon Federal ownership of the lands they

occupy, but upon the subject matter. See *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S., 188, where the court said:

> This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people that it had engaged to protect. * * * Based, as it is, exclusively on the Federal authority over the *subject matter*, there is no disturbance of the principle of State equality (p. 197).
>
> *Perrin* v. *United States*, 232 U. S., 478, 484–5.
> *United States* v. *Sandoval*, 231 U. S., 28.

Mere ownership of the fee in lands within a State enlarges the Government's legislative power only for the purpose of protecting and enforcing its proprietary rights therein, and protecting the officers and agents employed to administer them.

The agreement here involved was within the scope of the treaty-making power vested in the Government.

> Inasmuch as the power [to make treaties] is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our Government and the relation between the States and the United States. *Holden* v. *Joy*, 17 Wall., 211, 243 (involving an Indian treaty); *Geoffrey* v. *Riggs*, 133 U. S., 258, 267.

The last lines above quoted refer, of course, to the nature of our Government and the relations between the States and the Union, *as established by the Federal Constitution;* and that Constitution, as above shown, contains prohibitions and grants powers which curb the exercise of State police authority in many directions.

In *Geer* v. *Connecticut*, 161 U. S., 519, it was said that the power to control the taking of animals *ferae naturae*,

> which the Colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, *in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution* p. (528). [Italics mine.]

In that case it was held, after very profound consideration, that the particular exercise there involved, by Connecticut, of the power to control the taking and disposal of game was not incompatible with or restrained by the Constitutional grant of power to Congress over interstate commerce. But the decision is no authority for the proposition that the granted power to make treaties with Indian tribes may not be so exercised as to restrain State legislation concerning the taking of game and fish.

Ward v. *Race Horse*, 163 U. S., 504, is clearly distinguishable from the case under consideration. The lands there involved were not affected by any

ancient Indian rights reserved in the very act of cession. They were public lands to which the Indian title had been totally extinguished; and over such land State game laws undoubtedly extend. The Court repeatedly pointed out and emphasized the temporary character of the hunting rights granted by the treaty; and it was not unreasonable to hold that the contingencies on which the right was to terminate happened when the State was admitted to the Union. Moreover, the Court did not *decide* that the Federal Government had no *power* by the use of appropriate language, to secure to the Indians a right of hunting after the admission of the State. What was said about police powers and the effect of admitting a State on an equal footing with the original States was advanced merely to indicate the true interpretation of the treaty and of the act of admission. This is shown by the language used on page 514.

The *Race Horse case,* in short, decided only that the statute admitting Wyoming into the Union as a State repealed the provision of the treaty granting to the Indians rights of hunting upon the unoccupied lands of the United States, and that the treaty in itself contemplated that such rights were to be extinguished by the admission of the State. The case did not hold that it was not within the power of the Federal Government to secure to Indians by treaty a reserved right of hunting or fishing on ceded lands thereafter included within the boundaries of a State.

Indeed, the later *Winans case* expressly decided that the United States might by treaty impose a servitude upon specified lands which would prevail even after the admission into the Union of the State containing these lands.

V.

The operation of the State fish and game laws was excluded by the exercise of Federal power.

The theory that a State may regulate the rights of tribal Indians in regard to any matter upon which the Federal authority has failed to act is obviously unsound. In practice it would have defeated the very purposes which so urgently moved the Constitution makers to place the subject of Indian relations under the control of the General Government.

> From necessity there can be no divided authority. The *Kansas Indians*, 5 Wall., 737, 755.

This has been fully shown in the brief of counsel for the plaintiff in error and needs no further comment.

But, even if that theory were sound, there is no room for its application here. Unless the treaty is to be construed as herein contended, the case for the Indians falls to the ground. If, on the other hand, that construction is correct, then it becomes clear that the Federal authority had acted upon the very subject matter to which the State now seeks to apply her laws. By a treaty never abrogated, never modified or repealed, the United States had declared and still declares, that the Seneca Indians have a free

right of fishing and hunting upon the ceded lands, with such limitations only as the treaty itself reasonably implies; and no room was left for State legislation.

SUMMARY.

In the case at bar there is no question of repeal of the treaty by any statute of admission to the Union. New York was already within the Union at the time of the treaty. The land in question at the time of the treaty was within the geographical limits of the State of New York; but being land owned by the Indians was not subject to the jurisdiction of the State of New York. The Indians upon this land were wards of the United States and protected by its laws. New York gained its jurisdiction over these lands only when they were sold by the Indians to Morris; and as this sale was made by means of a treaty with the United States, New York acquired only such jurisdiction over the lands as was compatible with the terms of the treaty. In the cession of Indian lands, it is within the power of the United States by statute or treaty to impose such restrictions, reservations, or servitudes as it may deem necessary for the protection or benefit of its Indian wards. These restrictions so imposed may prevent the exercise by the State of police powers which it might otherwise exercise on the lands in question; thus the power to enforce State liquor laws may be limited by a subjection by Federal statute or treaty of the lands to Federal liquor legislation.

When the United States, by the treaty in the case at bar, assented to a reservation by the Indians of hunting and fishing rights in a specified tract of lands—in other words, to a servitude imposed on these lands—the United States Government impliedly agreed to protect these Indians as its wards in the enjoyment of these rights to hunt and fish in the manner usual to Indians at the time of the treaty, and to protect them against any impairment of the rights constituting such servitude by the State government or by anyone.

The real question, then, in this case is: Is the State statute prohibiting fishing with spears inconsistent with the right which the United States by treaty guaranteed to the Indians? If the State statute is so violative of the treaty provision, the State had no power to enact the same so far as these Indians are concerned, and has no jurisdiction to try the Indians for violation of the statute.

It is of course true that the courts do not lightly construe a treaty or an act of Congress so as to override State police laws. On the other hand, Indian treaties are uniformly construed as the Indians would naturally have understood them, and so as to give effect to that superior justice due from the strong to the weak. Here the Indians stipulated for a perpetual right, of transcendent importance to them, without the slightest suggestion in the language used, or in the attendant circumstances, that its exercise, in accordance with their ancient customs, could be interfered with by any third party. It follows that the

State laws limiting the right as to time, means, and methods, so as to make it practically valueless for purposes of continuous subsistence, are in direct conflict with the treaty. Those laws, with their criminal sanctions, "interfere forcibly with the relations established between the United States and the (Seneca) nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the Government of the Union." (*Worcester* v. *Georgia*, *supra*, p. 560.)

It follows that the order remanding the prisoners should be reversed.

CHARLES WARREN,
Assistant Attorney-General.
W. W. DYAR,
Attorney, Department of Justice.

MARCH, 1916.

APPENDIX A.

THE HARTFORD CONVENTION.

(Journals of Congress, Vol. IV, p. 787.)

To all to whom these presents shall come, The underwritten, John Lowell, James Sullivan, Theophilus Parsons, and Rufus King, agents or commissioners, appointed by the commonwealth of Massachusetts of the one part, and the underwritten, James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith, and Egbert Benson, six of the agents or commissioners, appointed by the state of New-York of the other part, send greeting: Whereas the commonwealth of Massachusetts did, heretofore, present a petition to the United States in Congress assembled, thereby, among other things, stating, that all that territory which, in the said petition, is described as "All that part of New-England, in America, which lieth and extendeth between a great river, called Merrimack, and a certain other river there, called Charles river, being the bottom of a bay there, called Massachusetts-Bay: and also, all those lands lying within three English miles to the southward of the southermost part of the said bay; and extending thence northward, in latitude to the northward of every part of said river Merrimack; and in breadth of latitude aforesaid, extending throughout all the main land, in longitude, westwardly, to the southern ocean," was the just and proper right of the said commonwealth; and further, stating, that

the state of New-York had set up a claim to some part of the land before mentioned, the said commonwealth did, therefore, by the said petition, solemnly request of the United States in Congress, that commissioners might be appointed, for enquiring into and determining upon the claim aforesaid, of the legislature of the said commonwealth, and that such other proceedings, respecting the premises, might be had, as are, by the federal government of the said United States, in such case made and provided, as by the said petition, filed among the archives of the United States, reference being thereunto had, may more fully appear. And whereas the state of New-York, doth, in opposition to the said claim of the commonwealth of Massachusetts, claim, as the just and proper right of the said state, as well in respect of property as jurisdiction, all those lands and territories bounded on the north by the parallel of the latitude passing through the said point, place or boundary aforesaid of three miles to the northward of every part of the said river Merrimack, and bounded on the south by the parallel of latitude passing through the said point or place, situate three miles south of the southermost part of the said bay, called Massachusetts-Bay, bounded on the west by the limits between the United States and the king of Great-Britain, and the line of cession from the state of New-York to the United States, and bounded on the east by the line agreed on and established between the late colony of the Massachusetts-Bay and the late colony of New-York, in the year 1773, and from the northern termination of the said line, then bounded on the east by the west bank of Connecticut river. And whereas the state of New-York, having been duly notified, did appear, by their lawful agents,

to vindicate such their said right against the said claim of the said commonwealth, and proceedings were thereupon had in Congress, pursuant to the articles of confederation, in order to the appointment of commissioners or judges to constitute a court for hearing and determining the said matters in question. And whereas the said John Lowell, James Sullivan, Theophilus Parsons and Rufus King, were afterwards, by a certain commission, under the seal of the said commonwealth, and bearing date the 26th day of April, in the 9th year of the independence of the United States, and made in pursuance of an act of the legislature of the said commonwealth, passed the 14th day of March, in the 8th year of the independence of the United States; and of a resolution of the said legislature, passed the 18th day of the said month of March, commissionated to be agents, to manage, conduct and prosecute the claims of the said commonwealth, to the lands described in the said petition. And whereas, afterwards, and pending such proceedings in Congress, the legislature of the commonwealth of Massachusetts did, by an act, entitled an act empowering the agents appointed by this government, to defend the territory on the west side of "Hudson's river, against the claims of the state of New-York, to settle the controversy relative thereto, otherwise than by a federal court, if they shall judge it expedient," enact, that the major part of the said agents or commissioners, should be fully authorized and empowered to agree with the agents or commissioners of the state of New-York, and settle the controversy respecting the territory aforesaid, by a federal court, as appointed by virtue of the confederation, or otherwise, in such way and manner as they should judge would comport with justice and

the interest of the said commonwealth; and the legislature of the state of New-York did, by an act, entitled "An act supplementary to the act, entitled an act to appoint agents or commissioners, for vindicating the right and jurisdiction of this state, against the claims of the commonwealth of Massachusetts, pursuant to the articles of confederation and perpetual union of the United States," among other things enact, that it should be lawful for the said James Duane, Robert R. Livingston, Egbert Benson, John Haring, Melancton Smith and Robert Yates, and also John Lansing, jun. or any five or more of them, to settle the said controversy between the said state of New-York, and the said commonwealth of Massachusetts, otherwise than by the said federal court, in such manner as they should judge most conducive to the interest of the said state, as by the said commission and the said several acts, relation being thereunto had, may appear: Now, therefore, know ye, that the underwritten commissioners, on the part of the commonwealth of Massachusetts and the state of New-York, respectively, having, by mutual consent, assembled at the city of Hartford, in the state of Connecticut, on the 30th day of November last, in order to the due execution of their respective trusts, and having duly exchanged and considered their respective powers, and declared the same legal and sufficient, after several conferences, and to the end that all interfering claims and controversies between the said commonwealth of Massachusetts and the said state of New-York, as well in respect of jurisdiction as property, may be finally settled and extinguished, and peace and harmony for ever established between them on the most solid foundation; have agreed, and by these presents do

mutually for and in behalf of the said commonwealth of Massachusetts and the said state of New-York, by whom respectively, they, the said commissioners, have been so appointed and authorized as aforesaid, agree to the mutual cessions, grants, releases, and other provisions following, that is to say: First, the commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the state of New-York for ever, all the claim, right and title which the commonwealth of Massachusetts hath to the government, sovereignty and jurisdiction of the lands and territories so claimed by the state of New-York, as herein before stated and particularly specified. Secondly, the state of New-York doth hereby cede, grant, release, and confirm to the said commonwealth of Massachusetts, and to the use of the commonwealth, their grantees, and the heirs and assigns of such grantees for ever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title, and property (the right and title of government, sovereignty, and jurisdiction excepted) which the state of New-York hath, of, in, or to 230,400 acres to be located by the commonwealth of Massachusetts, and to be situate to the northward of and adjoining to the lands granted respectively to Daniel Coxe and Robert Lettice Hooper, and their respective associates, and between the rivers Oswego and Chenengo, and also of, in, or to all the lands and territories within the following limits and bounds, that is to say, beginning in the north boundary line of the state of Pennsylvania, in the parallel of 42 degrees of north latitude, at a point, distant 82 miles west from the north-east corner of the state of Pennsylvania, on Delaware river, as the said boundary line hath been run and marked by the commissioners

appointed by the states of Pennsylvania and New-York, respectively; and from the said point or place of beginning, running on a due meridian north, to the boundary line between the United States of America and the king of Great-Britain; thence westerly and southerly along the said boundary line, to a meridian which will pass one mile due east from the northern termination of the streight or waters between lake Ontario and lake Erie; thence south along the said meridian to the south shore of lake Ontario; thence on the eastern side of the said streight, by a line always one mile distant from and parallel to the said streight, to lake Erie; thence due west to the boundary line between the United States and the king of Great-Britain; thence along the said boundary line until it meets with a line of cession from the state of New-York, to the United States; thence along the said line of cession, to the northwest corner of the state of Pennsylvania, and thence east along the northern boundary line of the state of Pennsylvania, to the said place of beginning; and which said lands and territories so ceded, granted, released and confirmed, are parcel of the lands and territories described in the said petition. Thirdly, the commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the state of New-York and to the use of the state of New-York, and their grantees, and the heirs and assigns of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property which the commonwealth of Massachusetts hath of, in, or to the residue of the lands and territories so claimed by the state of New-York, as herein before stated and particularly specified. Fourthly, that the lands so ceded, granted, released and confirmed to

the commonwealth of Massachusetts, or such part thereof as shall, from time to time, be and remain the property of the commonwealth of Massachusetts, shall, during the time that the same shall so be and remain such property, be free and exempt from all taxes whatsoever, and that no general or state tax, shall be charged on or collected from the lands hereafter to be granted by the commonwealth of Massachusetts, or on the occupants or proprietors of such lands, until 15 years after such confirmation as is herein after mentioned of such grants shall have expired; but that the lands so to be granted, and the occupants thereof, shall, during the said period, be subject to town or county charges or taxes only; provided that this exemption from general or state taxes shall not be construed to extend to such duties, excises or imposts to which the other inhabitants of the state of New-York shall be subject and liable. Fifthly, that no rents or services shall be reserved in any grants to be made of the said lands, by the commonwealth of Massachusetts. Sixthly, that the inhabitants on the said lands and territories, being citizens of any of the United States, and holding by grants from the commonwealth of Massachusetts, shall be entitled to equal rights with the other citizens of the state of New-York; and further, that the citizens of the commonwealth of Massachusetts, shall, from time to time, and at all times hereafter, have and enjoy the same and equal rights respecting the navigation and fishery on and in lake Ontario and lake Erie, and the waters communicating from the one to the other of the said lakes, and respecting the roads and portages between the said lakes, as shall, from time to time, be had and enjoyed by the citizens of the state of New-York; and the citizens of the commonwealth of

Massachusetts shall not be subject to any other regulations or greater tolls or duties to be made or imposed, from time to time, by the state of New-York, respecting the premises, than the citizens of the state of New-York shall be subject to. Seventhly, that no adverse possession of the said lands for any length of time, shall be adjudged a disseizen of the commonwealth of Massachusetts. Eighthly, that the state of New-York, so long as any part of the said lands shall be and remain the property of the commonwealth of Massachusetts, shall not cede, relinquish, or in any manner divest themselves of the government and jurisdiction of the said lands, or any part thereof, without the consent of the commonwealth of Massachusetts. Ninthly, that the commonwealth of Massachusetts may, from time to time, by person to be by them authorized for the purpose, hold treaties and conferences with the native Indians, relative to the property or right of soil of the said lands and territories hereby ceded, granted, released and confirmed to the commonwealth of Massachusetts, and with such armed force as they shall deem necessary for the more effectual holding such treaty or conference; and the commonwealth of Massachusetts, within six months after such treaties shall respectively be made, shall cause copies thereof to be deposited in the office of the secretary of the state of New-York. Tenthly, the commonwealth of Massachusetts may grant the right of pre-emption of the whole or any part of the said lands and territories, to any person or persons, who, by virtue of such grant, shall have good right to extinguish by purchase, the claims of the native Indians; provided however, that no purchase from the native Indians by any such grantee or grantees shall be valid, unless the same shall be

made in the presence of, and approved by a superintendent to be appointed for such purpose by the commonwealth of Massachusetts, and having no interest in such purchase, and unless such purchase shall be confirmed by the commonwealth of Massachusetts. Eleventhly, that the grantees of the said lands and territories under the commonwealth of Massachusetts, shall, within six months after the confirmation of their respective grants, cause such grants, or the confirmations thereof, or copies of such grants or confirmations, certified or exemplified under the seal of the commonwealth of Massachusetts, to be deposited in the said office of secretary of the state of New-York, to the end that the same may be recorded there; and after the same shall have been so recorded, the grantees shall be entitled to receive again from the said secretary, their respective grants or confirmations, or the copies thereof, whichsoever may have been so deposited, without any charges or fees of office whatsoever, and every grant or confirmation which shall not, or of which such copy shall not be so deposited, shall be adjudged void. In testimony whereof, the said John Lowell, James Sullivan, Theophilus Parsons and Rufus King, for and in the name and behalf of the said commonwealth of Massachusetts, and the said James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith and Egbert Benson, for and in the name and on behalf of the said state of New-York, have to these presents, and a duplicate thereof, both indented, interchangeably set their hands and affixed their seals. Done at the city of Hartford aforesaid, the 16th day of December, in the year of our Lord 1786, and the 11th year of the independence of the United States of America. The following errors in

transcribing being corrected before execution, viz. the words [the underwritten] between the 1st and 2d lines, [there] between the 4th and 5th lines, [are] and [said] between the 9th and 10th lines, [point] between the 11th and 12th lines, [said] between the 18th and 19th lines, [an act entitled] between the 22d and 23d lines, [relative thereto] between the 23d and 24th lines, [and] and [also] between the 28th and 29th lines, [following] between the 36th and 37th lines, [sovereignty] between the 40th and 41st lines, [appointed] between the 44th and 45th lines of the first sheet, being interlined; and [of Massachusetts] between the 11th and 12th lines, [native] between the 15th and 16th lines, [ceded] between the 16th and 17th lines, and [so] between the 27th and 28th lines, interlined in the second sheet, and an erasure between the words [until] and (fifteen) made in the second sheet. John Lowell, (L. S.) James Sullivan, (L. S.) Theophilus Parsons, (L. S.) Rufus King, (L. S.) James Duane, (L. S.) Robert R. Livingston, (L. S.) Robert Yates, (L. S.) John Haring, (L. S.) Melancton Smith, (L. S.) Egbert Benson, (L. S.) Witnesses present at the sealing and delivery, George Wyllys, Thos. Seymour, Jesse Root, Jere. Wadsworth, D. Humphreys, Wm. Imlay, Joseph Webb, Simeon De Witt, Lewis Duboys, Nathaniel Bethune. Be it remembered, that on this 30th day of January, in the year of our Lord 1787, personally appeared before me Richard Morris, esq. chief justice of the state of New-York, Jeremiah Wadsworth and Lewis Duboys, esqrs. two of the subscribing witnesses to the within instrument, who being by me duly sworn, did severally depose and say, that they were present, and did see the within named James Duane, Robert R. Livingston,

Robert Yates, John Haring, Melancton Smith, Egbert Benson, John Lowell, James Sullivan, Theophilus Parsons and Rufus King, severally, sign, seal and deliver the within instrument as their, and each of their free and voluntary act and deed to and for the uses and purposes therein mentioned; and that George Wyllys, Thomas Seymour, Jesse Root, D. Humphreys, William Imlay, Simeon De Witt and Nathaniel Bethune, the other subscribing witnesses, were also present, and did, together with the deponents, sign and subscribe their names as witnesses to the execution thereof; and I having inspected the said instrument, and finding no interlineations or material erasures therein, except those noted in the body thereof to have been made before the execution thereof, do allow the same to be recorded. Richard Morris. Secretary's office, office of the state of New-York, ss. I Certify that the within instrument and certificate are recorded in the said office, in book of miscellaneous records, endorsed

A

M R, page 38, &c. Examined and compared with the said record copy thereof, this 2d day of February, 1787, by me Robert Harpur, deputy-secretary. Secretary's office of the state of New-York, ss. I do hereby certify the aforegoing to be a true copy of the original thereof remaining in the said office, (the word "*hath*" between the 27th and 28th lines, and the syllable "*in*" between the 45th and 46th lines, being interlined; and the words "*excises*" on the 39th and "*Richard Morris*" on the 62d lines, being first written on razures.) Examined and compared therewith this 8th day of August, 1787, by me Robert Harpur, deputy-secretary.

APPENDIX B.

TREATY OF THE BIG TREE.

September 15, 1797.

JOHN ADAMS, PRESIDENT OF THE UNITED STATES OF AMERICA.

To all to whom these Presents shall come—GREETING:

Whereas a Treaty was held on the Fifteenth day of September last at Geneseo, in the County of Ontario in the State of New York under the authority of the United States with the Seneka Nation of Indians, and at the said treaty, in the presence and with the approbation of Jeremiah Wadsworth, the Commissioner of the United States, appointed to hold the same, a Convention was entered into between the said Seneka Nation of Indians, and the Claimant of the pre-emption right to the land which is the subject of the said Convention, in which the compensation for the extinguishment of the claims of the said Indians to that land is adjusted:—which Convention is in the words following———

This indenture made the fifteenth day of September in the year of our Lord one thousand seven hundred and ninety-seven, between the sachems chiefs and warriors of the Seneka nation of Indians of the first part, and Robert Morris of the city of Philadelphia Esquire of the second part—

Whereas the Commonwealth of Massachusetts have granted bargained and sold unto the said Robert Morris his heirs and assigns forever the pre-emptive right, and all other the right, title and interest, which the said Commonwealth had to all that tract of land hereinafter particularly mentioned, being part of a tract of land, lying within the State of New York, the right of pre-emption of the soil whereof, from the

native Indians was ceded and granted by the said State of New York to the said Commonwealth—and whereas at a treaty held under the authority of the United States, with the said Seneka nation of Indians at Geneseo in the county of Ontario and State of New York, on the day of the date of these presents and on sundry days immediately prior thereto, by the honorable Jeremiah Wadsworth Esquire a commissioner appointed by the President of the United States to hold the same, in pursuance of the constitution and of the act of the congress of the United States in such case made and provided, it was agreed in the presence and with the approbation of the said commissioner, by the sachems, chiefs and warriors of the said nation of Indians for themselves and in behalf of their nation to sell to the said Robert Morris and to his heirs and assigns forever all their right to all that tract of land above recited and hereinafter particularly specified for the sum of one hundred thousand dollars to be by the said Robert Morris vested in the stock of the bank of the United States, and held in the name of the President of the United States for the use and behoof of the said nation of Indians, the said agreement and sale being also made in the presence, and with the approbation of the honorable William Shepherd Esquire the superintendant appointed for such purpose in pursuance of a resolve of the General Court of the Commonwealth of Massachusetts, passed the eleventh day of March in the year of our Lord one thousand seven hundred and ninety-one. Now this indenture witnesseth that the said parties of the first part for and in consideration of the premises above recited and for divers other good and valuable considerations them thereunto moving, have granted, bargained, sold, aliened,

released, enfeoffed and confirmed and by these presents do grant, bargain, sell, alien, release, enfeoff and confirm unto the said party of the second part, his heirs and assigns forever all that certain tract of land except as is hereinafter excepted lying within the county of Ontario and State of New York being part of a tract of land the right of pre-emption whereof was ceded by the State of New York to the Commonwealth of Massachusetts by deed of cession executed at Hartford on the sixteenth day of December in the year of our Lord one thousand seven hundred and eighty-six, being all such part thereof as is not included in the Indian purchase made by Oliver Phelps and Nathaniel Gorham and bounded as follows, to wit, easterly by the land confirmed to Oliver Phelps and Nathaniel Gorham by the legislature of the Commonwealth of Massachusetts by an act passed the twenty-first day of November in the year of our Lord one thousand seven hundred and eighty-eight, southerly by the north boundary line of the State of Pennsylvania, westerly, partly by a tract of land part of the land ceded by the State of Massachusetts to the United States and by them sold to Pennsylvania, being a right angled triangle whose hypothenuse is in or along the shore of Lake Erie; partly by Lake Erie from the northern point of that triangle to the southern bounds of a tract of land one mile in width, lying on and along the east side of the streight of Niagara, and partly by the said tract to lake Ontario, and on the north by the boundary line between the United States and the King of Great Britain—excepting nevertheless and always reserving out of this grant and conveyance all such pieces or parcels of the aforesaid tract and such privileges thereunto belonging, as are next hereinafter particu-

larly mentioned which said pieces or parcels of land so excepted are by the parties to these presents clearly and fully understood to remain the property of the said parties of the first part in as full and ample manner as if these presents had not been executed, that is to say, excepting and reserving to them the said parties of the first part and their nation one piece or parcel of the aforesaid tract at Canawagus of two square miles to be laid out in such manner as to include the village extending in breadth one mile along the river—one other piece or parcel at Big Tree of two square miles to be laid out in such manner as to include the village extending in breadth along the river one mile, one other piece or parcel of two square miles at Little Beard's town extending one mile along the river to be laid off in such manner as to include the village—one other tract of two square miles at Squawky Hill, to be laid off as follows to wit, one square mile to be laid of along the river in such manner as to include the village, the other directly west thereof and contiguous thereto—one other piece or parcel at Gardeau, beginning at the mouth of Steep Hill creek, thence due east untill it strikes the old path, thence south untill a due west line will intersect with certain steep rocks on the west side of Genesee river, then extending due west, due north and due east untill it strikes the first mentioned bound enclosing as much land on the west side as on the east side of the river—One other piece or parcel at Ka-oun-a-de-au extending in length eight miles along the river and two miles in breadth—One other piece or parcel at Cataraugos beginning at the mouth of the Eighteen mile or Kogh-quau-gu creek thence a line or lines to be drawn parallel to lake Erie at the distance of one

mile from the lake, to the mouth of Cataraugos creek, thence a line or lines extending twelve miles up the north side of said creek at the distance of one mile therefrom, thence a direct line to the said creek, thence down the said creek to lake Erie, thence along the lake to the first mentioned creek, and thence to the place of beginning, Also one other piece at Cataraugos beginning at the shore of Lake Erie on the south side of Cataraugos creek at the distance of one mile from the mouth thereof, thence running one mile from the lake, thence on a line parallel thereto to a point within one mile from the Con-non-dau-we-yea creek thence up the said creek one mile on a line parallel thereto, thence on a direct line to the said creek, thence down the same to Lake Erie, thence along the lake to the place of beginning—Also one other piece or parcel of forty two square miles at or near the Allegenny river—Also two hundred square miles, to be laid off partly at the Buffaloe and partly at the Tannawanta creeks—Also excepting and reserving to them the said parties of the first part and their heirs the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed. And it is hereby understood by and between the parties to these presents, that all such pieces or parcels of land as are hereby reserved and are not particularly described as to the manner in which the same are to be laid off, shall be laid off in such manner as shall be determined by the sachems and chiefs residing at or near the respective villages where such reservations are made, a particular note whereof to be endorsed on the back of this deed and recorded therewith—together with all and singular the rights, privileges hereditaments and appurtenances thereunto belonging or in anywise apper-

taining And all the estate right title and interest whatsoever of them the said parties of the first part and their nation of, in and to the said tract of land above described except as is above excepted to have and to hold all and singular the said granted premises with the appurtenances to the said party of the second part his heirs and assigns to his and their proper use benefit and behoof forever—

In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

Robert Morris, by his attorney, Thomas Morris,
Koyengquahtah, als. Young King,
Soonookshewan,
Konutaico, als. Handsome Lake,
Sattakanguyase, als. Two Skies of a length,
Onayawos, or Farmer's Brother,
Soogooyawautau, als. Red Jacket,
Oneghtaugoosau,
Connawaudeau,
Taosstaiefi,
Koeentwahka, or Corn Planter,
Oosaukaunendauki, als. to Destroy a Town,
Sooeoowa, alias Parrot Nose,
Toonahookahwa,
Howwennounew,
Kounahkaetoue,
Taouyaukauna,
Woudougoohkta,
Sonauhquaukau,
Twaunauiyana,
Takaunoudea,
Shequinedaughque, or Little Beard,
Jowaa,
Saunajee,
Tauoiyuquatakausea,
Taoundaudish,
Toosauquainda,

Gishkaka, als. Little Billy,
Kaoundoowana, als. Pollard,
Ouneashataikau, or Tall Chief, by his agent Stevenson,
Teahdowainggua, als. Thos. Jemison,
Onnonggaiheko, als. Infant,
Tekonnondee,

Ahtaou,
Taukooshoondakoo,
Kauneskanggo,
Soononjuwau,
Tonowauiya, or Captain Bullet.

Jaahknaeyas,
Taugihshauta,
Sukkenjoonau,
Ahquatieya, or Hot Bread,
Suggonundau,
Taunowaintooh,
Konnonjoowauna,
Soogooeyaudestak,
Hautwanauekkau, by Young King,
Sauwejuwau,
Kaunoohshauwen,
Taukonondaugekta,
Kaouyanaughque, or John Jemison,
Hoiegush,
Taknaahquau.

To the Indian names are subjoined marks and seals.

Sealed and delivered in presence of—

Nat. W. Howell,
Joseph Ellicott,
Israel Chapin,
James Rees,
Henry Aaron Hills,
Henry Abeel,
Jasper Parrish,
Horatio Jones,
} *Interpreters.*

Done at a full and general treaty of the Seneka nation of Indians, held at Geneseo, in the county of Ontario, and State of New York, on the fifteenth day of September, in the year of our Lord one thousand seven hundred and ninety-seven, under the authority of the United States.

In testimony whereof, I have hereunto set my hand and seal, the day and year aforesaid.

JERE. WADSWORTH, [L. S.]

[Endorsement on face in margin.]

The words "of two square miles" also the words "at the shore of Lake Erie" also the word "Part" also the words "mile from* being interlined.—And the word "to a point within one" written on erasure.

[Endorsement on face.]

State of New York ss: I Thomas Cooper, Master in Chancery certify that on the third Day of May in the Year of our Lord one thousand seven hundred and ninety eight, came before me Jere. Wadsworth known to me to be the same person described in and who has executed the preceding writing, who did acknowledge that he did execute the same ——— There being no Erasures or Interlineations therein I do allow it to be recorded——

THOMAS COOPER

*Quotation-mark absent in original.

[Endorsement on back.]

Pursuant to a resolution of the legislature of the Commonwealth of Massachusetts, passed the eleventh day of March in the year of our Lord one thousand seven hundred and ninety-one, I have attended a full and general treaty of the Seneca nation of Indians, at Geneseo, in the county of Ontario, when the within instrument was duly executed in my presence by the Sachems Chiefs and warriors of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned, and declared to be done to their universal satisfaction. I do therefore certify and approve of the same.

WM. SHEPARD.

Subscribed in presence of—
NAT. W. HOWELL.

[Endorsement on back.]

State of New York, ss: I Thomas Cooper, Master in Chancery, certify that on the twenty-first Day of May, in the year of our Lord one thousand seven hundred and ninety-eight came before me Joseph Ellicott known to me to be the subscribing witness of that Name to the within Instrument of Writing, who being duly sworn doth on his oath say that he saw Thomas Morris as the attorney of and for Robert Morris, in the within Instrument of Writing mentioned, execute the said Instrument of Writing for the said Robert Morris, that the Deponent subscribed his Name as a witness thereto and that he saw Nat. W. Howell, Israel Chapin, James Rees, Henry Aaron Hills and Henry Abeel together with Jasper Parrish and Horatio Jones, the said Parrish and Jones being Interpreters, sign their Names as witnesses thereto; and I having satisfactory evidence that the Depo-

nent knew the said Thomas Morris and that he is the same person described by that Name in the said Instrument of Writing and who has executed the same and there being therein none but the noted alterations, I do allow it to be recorded as the Deed of the said within mentioned Robert Morris——

THOMAS COOPER.

[Endorsement on back.]

Recorded in the Secretary's Office of the State of New York in Book of Deeds endorsed $\frac{M\ R}{I}$ page 334 &c this 7th day of June 1798.—

DANIEL HALE Sec'y.

[Endorsement on back.]

State of New York, ss: I, Thomas Cooper, Master in Chancery do certify that on the twenty first Day of May in the year of our Lord one thousand seven hundred and ninety eight came before me Joseph Ellicott, known to me to be the subscribing witness of that Name to the within Instrument of writing who being by me duly sworn doth on his oath say that he saw the several Persons whose names are subscribed and seals affixed to the said Instrument of writing and who are described in the said Instrument of Writing as the Sachems, Chiefs and warriors of the Seneca Nation of Indians, respectively execute the said Instrument of writing, that he the Deponent subscribed his Name as a witness thereto; that he saw Nat. W. Howell, Israel Chapin, James Rees, Henry Aaron Hills and Henry Abeel together with Jasper Parrish and Horatio Jones, the said Parrish and Jones being Interpreters, subscribe their Names as witnesses thereto; that he knew the said several Persons who so executed the said Instrument of writing and that they were the same Persons who are

described in the said Instrument of writing as the Sachems, Chiefs and warriors of the Seneca Nation of Indians, which being to me satisfactory evidence that the Deponent knew the said several Persons who so as aforesaid executed the within Instrument of writing and that they are the same Persons described as the Sachems, Chiefs and Warriors of the Seneca Nation of Indians in the said Instrument of writing and who have executed the same and there being therein none but the noted alterations I do allow it to be recorded as the acts and Deeds of the said Sachems, Chiefs and Warriors of the Seneca Nation of Indians respectively ———

THOMAS COOPER.

[Indorsement on back.]

Now be it known, That I JOHN ADAMS, President of the United States of America, having seen and considered the said Convention or Treaty, and being satisfied that the Investment of the money therein mentioned, has been made conformably to the intention of the said Convention or Treaty DO by and with the Advice and Consent of the Senate, accept, ratify and confirm the same, and every clause and article thereof.

In testimony whereof, I have caused the Seal of the United States of America to be affixed to these Presents, and signed the same with my Hand. DONE at the City of Philadelphia, the Eleventh day of April in the Year of our Lord one thousand seven hundred and ninety-eight, and of the Independence of the United States of America, the Twenty-Second.

JOHN ADAMS

By the President of the United States

TIMOTHY PICKERING

Sec'y of State.

APPENDIX C.

"An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers."

Approved May 19, 1796 (1 Stat. 469).

* * * * *

Sec. 12. And be it further enacted, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

APPENDIX D.

As showing the conceptions of the Indians at the time of the treaty concerning their relations to the United States and the State of New York, see quotations below from a practically contemporaneous speech by the Seneca chief, Red Jacket (1802). An Indian, while drunk, had killed a white man on the reservation and the State officials demanded that the Indians surrender him for trial by a State court. The United States commissioner to the Indians had been removed and a successor appointed without consultation with the Indians.

> Brothers, since this accident has taken place we have been informed that by the laws of this State, if a murder is committed within it the murderer must be tried by the laws of the State and punished with death.
>
> Brothers, when were such laws explained to us? Did we ever make a treaty with the State of New York and agree to conform to its laws? No. We are independent of the State of New York. It was the will of the Great Spirit to create us different in color; we have different laws, habits, and customs from the white people. We shall never consent that the government of this State shall try our brother. We appeal to the Government of the United States.
>
> * * * * *
>
> Brothers, the President of the United States is called a great man, possessing great power. He may do what he pleases; he may turn men out of office—men who held their offices long before he held his. If he can do these things can he not even control the laws of this State? Can he not appoint a commissioner to come forward to our country and settle the present

> difference, as we, on our part, have heretofore often done to him upon a similar occasion?
>
> We now call upon you, brothers, to represent these things to the President, and we trust that he will not refuse our request of sending a commissioner to us, with powers to settle the present difference. The consequence of a refusal may be serious. We are determined that our brother shall not be tried by the laws of the State of New York. Their laws make no difference between a crime committed in liquor and one committed coolly and deliberately. Our laws are different, as we have before stated. If tried here our brother must be hanged. We can not submit to that. Has a murder been committed upon our people? When was it punished with death? *Stone's Life of Red Jacket*, pp. 175, 176 (Wiley & Putnam, 1841).

As further showing the conception of the Indians, see letter of Timothy Pickering, Commissioner of the United States, to Gen. Knox, Secretary of War, referring to another sale of Seneca lands by the tribe to certain descendants of some of the Senecas in 1791:

> Here was the ground of my ratification. Now, you will be pleased to recollect that before the matter was opened in council I had repeated the law of the United States relative to Indian lands and the solemn declaration of the President last winter to the Cornplanter that they (the Indians) had the right to sell, or to refuse to sell, their lands, and that, in respect to their lands they might depend on the protection of the United States, so that on this head they had now no cause for jealousy or discontent. This being by them well understood, I saw no way of avoiding the ratification of the assignment to their

two children, without reviving or rather exciting their utmost jealousy, as it would have been denying the free enjoyment of their own lands by some members of the nation, according to the will of the nation; and a denial, I was apprehensive, would lead them to think that the solemn assurance of the President was made but to amuse and deceive. *The Treaty of Big Tree*, by W. H. Samson, in *Livingston County Historical Society Proceedings*, 19th Annual Meeting, Jan. 15, 1895.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. Walter S. Kennedy, plaintiff in error,
against
FREDERICK W. BECKER AS SHERIFF OF ERIE County, N. Y., defendant in error.

No. 666.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This cause comes to this court by writ of error allowed at the instance of relator to review the decision herein made in May, 1915, by the Court of Appeals of the State of New York. (215 N. Y. 42.)

The question herein was raised by writ of habeas corpus issued in June, 1914, by the Supreme Court of New York at special term on application of relator to inquire into the cause of detention by the defendant in error of the three prisoners below, Warren Kennedy, Fayette Kennedy, and Willis White, jr. The question was whether a magistrate of New York, an official of petit criminal jurisdiction who had committed the prisoners to the custody of the sheriff,

the defendant in error, had jurisdiction over them. In turn arose the question whether a game protector, an officer of New York, had jurisdiction to take the prisoners into custody and before this magistrate and, in turn, whether the laws of the State of New York were operative over the prisoners who were tribal Indians of the Seneca Nation, while they were engaged in taking fish in the waters of territory subject to an outstanding tribal right to take fish and game thereon. That right to take fish appears in the treaty between the Seneca Nation and the United States of America made at Big Tree on the Genesee in the year 1797 and whereby, subject to such right, a large territory was ceded by the Senecas to Robert Morris. That territory may be generally described as lying between Lake Erie on the west, the Genesee River on the east and within the exterior bounds of the State of New York as fixed by convention between the United States and the State of New York through the New York delegates in Congress in 1781, but without purporting to override the rights of the occupant Indian tribes in the contained territory occupied by Indians. A map exhibiting the *locus in quo* and immediate neighborhood is hereto attached as part of this brief.

The relator applied for the writ of habeas corpus in behalf of the prisoners, a right given by the New York Code of Civil Procedure (Sec. 2017) permitting any person so to apply. The relator was a Cattaraugus Seneca.

FACTS.

The three prisoners, residents of the Cattaraugus (residence) reservation of the Senecas, journeyed some twelve miles across the adjacent "ceded" lands to the north and on May 31st, 1914, were engaged in taking fish with spears, an approved Indian method, in Eighteen Mile Creek within a mile from Lake Erie. Between them they had taken and possessed two small-mouthed black bass, two bull heads, one cat fish, two carp, and nine suckers and mullets. They were then and there arrested, without warrant issued, by a New York State officer known as a special game protector and taken thence some twenty miles northerly to the town of Tonawanda, Erie County, where they were arraigned by their captor before a State magistrate, a justice of the peace, on the charge of violating section 176 of the State Conservation Law. That act provided, sec. 177 subd. 2:

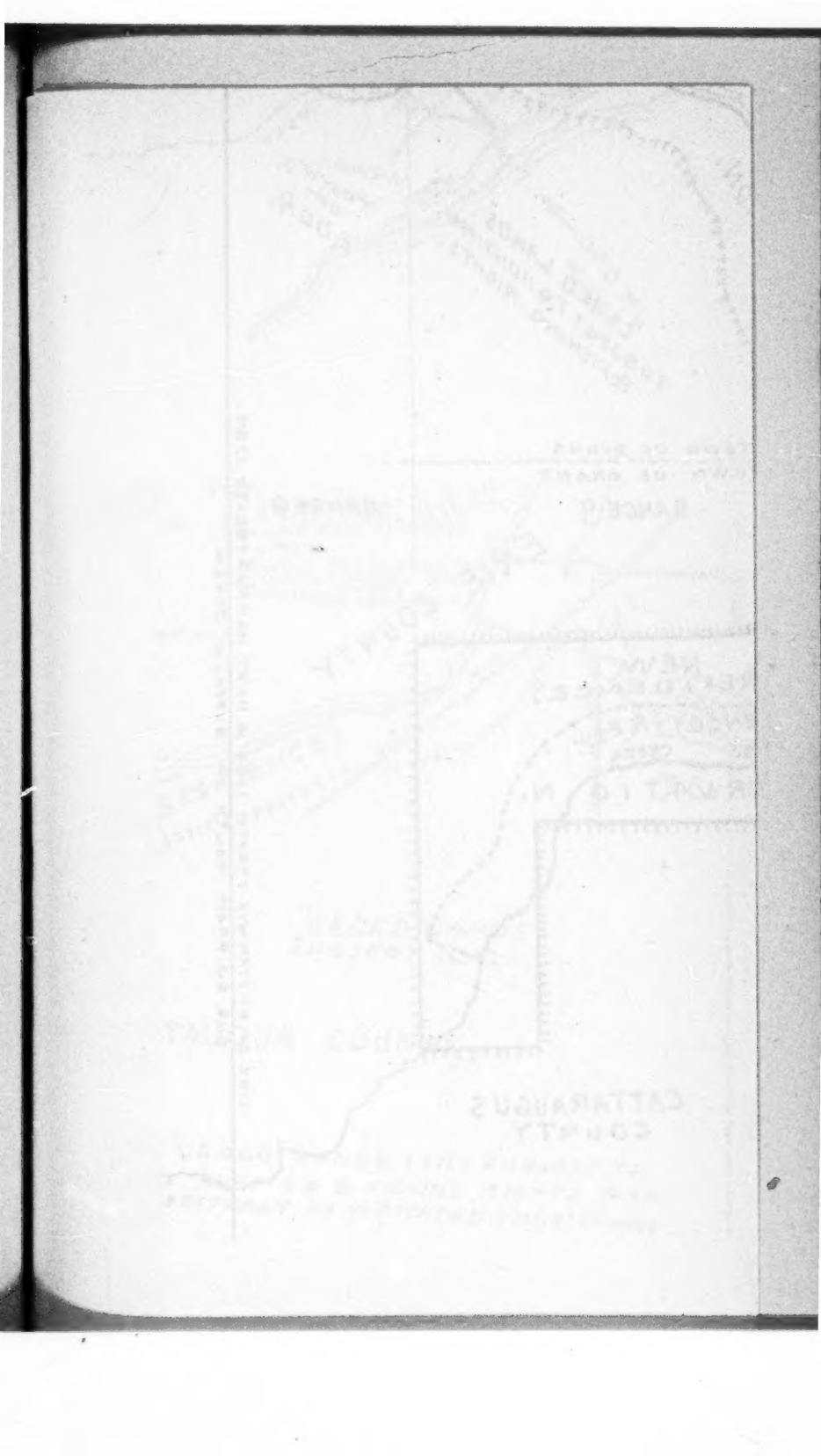
> Manner of taking fish: Fish, except migratory food fish of the sea, shall only be taken by angling, unless otherwise specifically permitted by this article. In case any fish or crustacea is unintentionally taken contrary to the prohibitions or restrictions contained in any of the provisions of this article, such fish or crustacea shall be immediately liberated and returned to the water without unnecessary injury. Whenever any fish under the size limit prescribed by the provisions of this article are received in transportation from another State or country, or whenever such fish are taken in gill nets, they shall neither be sold, bought, or otherwise trafficked in.

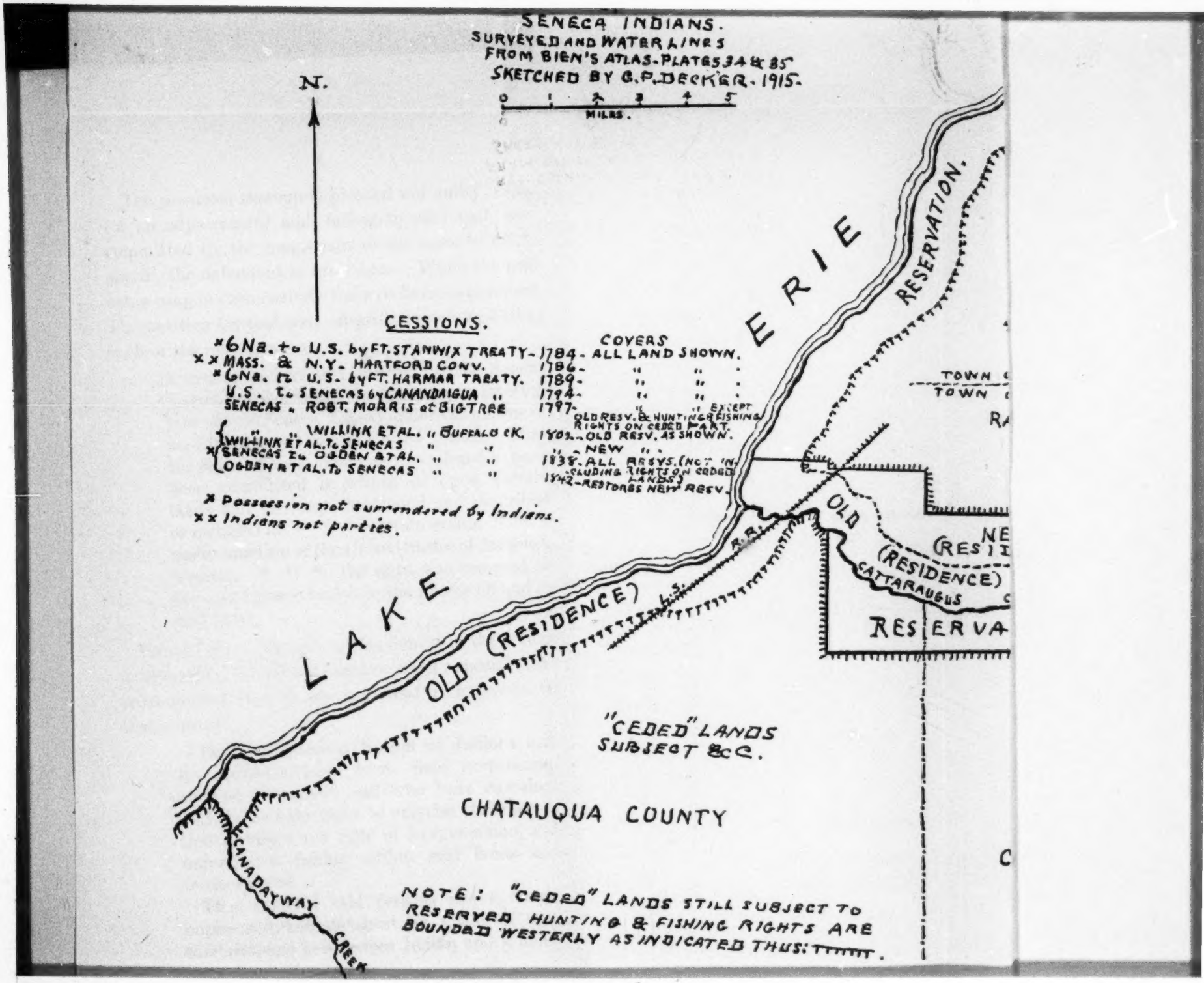
The prisoners thereupon pleaded not guilty, asked for an adjournment and, failing to offer bail, were committed by the magistrate to the custody of the sheriff, the defendant in error here. While the prisoners were in such custody the writ below was issued. The petition for that writ alleged (Record, p. 3) that each of the prisoners was

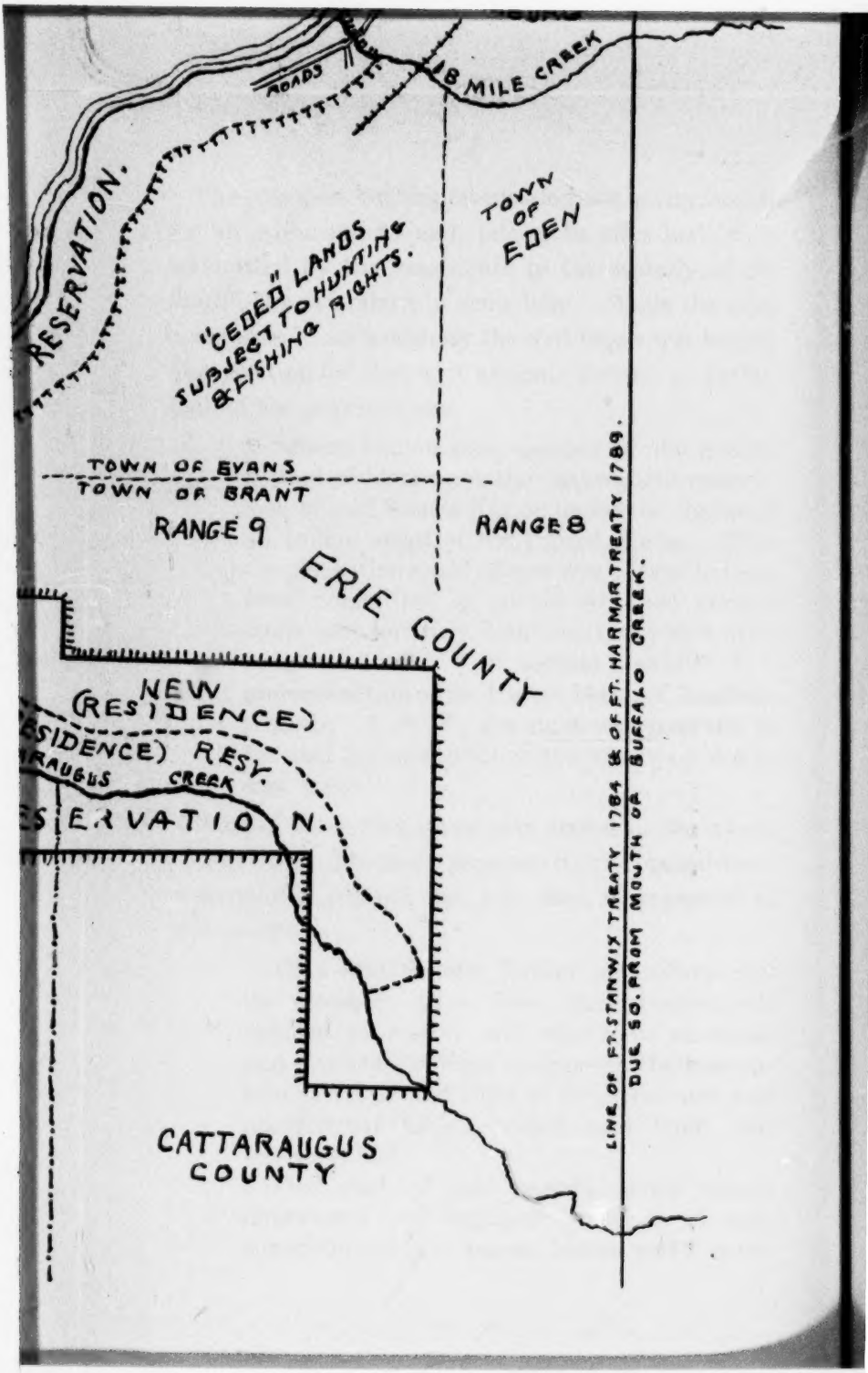
> a Seneca Indian and member of the Seneca Nation residing upon the Cattaraugus reservation of said Seneca Nation under the charge of an Indian agent of the United States. That the place where said offense was alleged to have been committed is within or upon certain lands and territory mentioned and described or included in * * * certain grants * * * under sanction of the United States of America, whereby * * * the right was reserved to the said Indians to fish in the waters on and in said lands.

None of those allegations was denied in the return to that writ. The State supreme court's special-term order recited (record, pp. 8:9) that it appeared to that court—

> That said Seneca Nation of Indians and its members have from time immemorial claimed to reserve and who have exercised and claimed the right to exercise the reservation privilege and right of free, common, and unrestricted fishing within said lands and territory, and
>
> That each of said persons above named imprisoned and detained by virtue of such commitments is a Seneca Indian and a mem-




SENECA INDIANS.
SURVEYED AND WATER LINES
FROM BIEN'S ATLAS - PLATES 34 & 35
SKETCHED BY G. P. DECKER. 1915.
N.
0 1 2 3 4 5
MILES.
CESSIONS.
*6Na. to U.S. by FT. STANWIX TREATY - 1784 - COVERS ALL LAND SHOWN.
** MASS. & N.Y. - HARTFORD CONV. 1786 - " " "
*6Na. to U.S. by FT. HARMAR TREATY. 1789 - " " "
U.S. to SENECAS by CANANDAIGUA " 1794 - " " "
SENECAS " ROBT. MORRIS at BIGTREE 1797 - " " EXCEPT OLD RESV. & HUNTING & FISHING RIGHTS ON CEDED PART.
" " WILLINK ETAL. " BUFFALO CK. 1802 - OLD RESV. AS SHOWN.
WILLINK ETAL. TO SENECAS " " " " - NEW " "
*SENECAS TO OGDEN & TAL. " " 1838 - ALL RESVS. (NOT INCLUDING RIGHTS ON CEDED LANDS)
OGDEN ET AL. TO SENECAS " " 1842 - RESTORES NEW RESV.
* Possession not surrendered by Indians.
** Indians not parties.
LAKE ERIE
RESERVATION.
OLD (RESIDENCE)
OLD (RESIDENCE)
CATTARAUGUS
RESERVA
R.R.
"CEDED" LANDS
SUBJECT &C.
CHATAUQUA COUNTY
CANADAWAY CREEK
NOTE: "CEDED" LANDS STILL SUBJECT TO RESERVED HUNTING & FISHING RIGHTS ARE BOUNDED WESTERLY AS INDICATED THUS: TTTTTT.


ROADS
8 MILE CREEK
RESERVATION.
"CEDED" LANDS
SUBJECT TO HUNTING
& FISHING RIGHTS.
TOWN OF EDEN
TOWN OF EVANS
TOWN OF BRANT
RANGE 9
RANGE 8
ERIE COUNTY
NEW
(RESIDENCE)
RESY.
CREEK
ES ERVATIO N.
CATTARAUGUS
COUNTY
LINE OF FT. STANWIX TREATY 1784 & OF FT. HARMAR TREATY 1789.
DUE SO. FROM MOUTH OF BUFFALO CREEK.

> ber of the Seneca Nation of Indians residing upon the Cattaraugus Reservation of said Seneca Nation under the charge of an Indian agent of the United States * * * and entitled to all the rights, benefits, privileges, and reservations set forth and contained in the said above-mentioned grants, treaties, agreements, deeds, and contracts.

The special term then ordered (p. 4) that the defendants be discharged from custody on the ground—

> That * * * the treaty made between the Seneca Nation of Indians and Robert Morris, under date of the year 1797, permitted said persons who are Indians to hunt and fish in the waters of this State included within said treaty, particularly Eighteen Mile Creek, at will and at all seasons of the year, regardless of the provisions of the game laws of the State of New York.

There has been no dispute of fact below as to the place where the fishing occurred; as to the time of it or the methods used or that the place of it and of the arrest, was within the territory subjected by the treaty of Big Tree to the tribal right therein reserved. Nor has there been any pretense that the Senecas since have, as to the *locus in quo*, surrendered their fishing rights so stipulated in that treaty.

SPECIFICATIONS OF ERROR.

Plaintiff in error specifies the following holdings of the State court of appeals which will be relied upon and urged as errors.

First. That the conservation law of New York, if applied to the prisoners on the facts existing, did not infringe the tribal rights of the Seneca Nation or infringe the personal rights of the prisoners as members thereof.

Second. That the State of New York, in the absence of any express prohibition by the Congress, may regulate enjoyment by the Six Nations of the tribal rights and tribal lands of said nations.

Third. That in the absence of action by the Congress on a given subject matter affecting tribal Indians, the legislature of any State or of a particular State thereon will be and remain effective till such time as the Congress shall act thereon.

Fourth. That as to the Six Nation Indians, New York has some greater jurisdiction than any other separate State to so act.

Fifth. That the fishing and hunting reservation clause of the Big Tree treaty did not secure to the tribal Senecas a right to fish on the territory covered thereby superior to the police power which New York might properly exercise thereafter against any other persons fishing or hunting on the same territory.

Sixth. That said treaty ceded away the right of the Seneca Nation to govern its own members in fishing and hunting on the Morris land and that New York State succeeded to such right.

Seventh. That said treaty is to be interpreted as subjecting tribal Senecas in fishing and hunting on that land, to the same sovereign control by New

York as New York may properly exercise over persons concededly subject to her State authority.

Eighth. That the Morris land is not to be deemed, for the purpose of fishing and hunting by the Senecas, as domain reserved to the Seneca Nation for equal enjoyment of fishing and hunting along with the State of New York.

Ninth. That the prisoners in fishing where they did were subject to arrest for their act by New York officials at the same spot and subject to trial therefor by New York courts.

Tenth. That the final order of the State supreme court ordering the discharge of the prisoners should be reversed and the prisoners remanded.

Historical.

The treaty of Big Tree occurred at the Seneca village of Big Tree (near Geneseo) on the Genesee River in the Seneca country. Robert Morris, the capitalist of Revolutionary fame, was ambitious to speculate in Indian land and shortly before had paid to the State of Massachusetts a large sum in consideration of the consent of that State that he become the direct purchaser of the title of the Senecas to most of the Seneca lands. At his instance a commissioner representing the United States was duly constituted and took part in the treaty. The written record of the transaction (Kappler's Indian Treaties, p. 102) purports to be an "indenture" and is in form of a common deed, but it nevertheless evidences the holding and conclusion of a public treaty, for the United

States and the Seneca Nation were in fact parties. Without the presence of the United States the document, as a mere conveyance of title to a white man of Indian lands, would have been void under the Federal Indian intercourse act. The land thus qualifiedly ceded to Morris, in consideration of $100,000.00 to be held by the United States for the benefit of the Senecas, embraced over 4,000,000 acres, being the territory (excepting the residence reserves retained) lying between the Genesee River on the east, Lake Erie on the west, Lake Ontario on the north, and the State of Pennsylvania on the south, being moreover, except their village lands, the whole then remaining territory of the Seneca Indians. After providing for the several residence reservations, to contain the principal villages or settlements of the Senecas, the document cedes the remainder to Morris,

> excepting and reserving to them, the said parties of the first part (the sachems, chiefs, and warriors of the Seneca Nation of Indians) and their heirs, the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed.

Under that language Morris and his grantees no doubt were entitled to fish and hunt on the same land, so that fishery and chase thereon were to be enjoyed by the Senecas and by those who might hold under Morris "in common", but in an uncommon situation, for it was not like the case of two private citizens of the same sovereignty.

Among the then-intended residence reserves was the old Cattaraugus reserve, consisting of strips of land, one of one mile in width adjoining Lake Erie and extending from Eighteen Mile Creek southerly to Canadaway Creek and the other of the same width, adjoining the north side of Cattaraugus Creek, reaching from Lake Erie inland, as that creek winds, twelve miles. The description of it in the treaty is:

> Beginning at the mouth of Eighteen Mile or Kogh-guaw-gu Creek; thence a line or lines to be drawn parallel to Lake Erie at the distance of one mile from the lake to the mouth of the Cattaraugas Creek; thence a line or lines extending twelve miles up the north side of said creek, at the distance of one mile therefrom; thence a direct line to said creek; thence down the said creek to Lake Erie; thence along the lake to the first mentioned creek, and thence to the place of beginning. * * *

Thus, the south bank of Eighteen Mile Creek at the *locus in quo* was to continue the absolute and exclusive property and domain of the Senecas, while the north bank was to become qualifiedly the private property of Morris for, together with all the land going to Morris; it was to be subject to the reserved tribal hunting and fishing rights named. The old Cattaraugus residence reserve was thus so laid out that it gave the Cattaraugus Senecas direct and exclusive access from the south to the *locus in quo*, evidencing a special value therein to these people for fishing and a calculated purpose on their part to retain the right.

The question of the intent of the parties to the treaty of Big Tree, in respect to whether enjoyment by the Senecas of fishery was to be subject to regulation by and jurisdiction of the tribe, as between the tribe and the State of New York, or to regulation by and jurisdiction of New York, goes to the heart of this cause. Since that intent is to be discovered with certainty only on consideration of the language used when read in the light of the circumstances precedent to and contemporaneous with the treaty, such circumstances of importance, all matters of a public nature of which courts must take notice, will for convenience of this court be here briefly outlined and so far as possible in chronological order of events.

During the period of the French foothold upon this territory they undertook no destruction of the rights of Six Nation Indians to fullest freedom in Six Nation land while peace obtained between the latter and the French. This period terminated in 1759 when Fort Niagara was taken by the British. During the period of some 125 years down to the evacuation of Fort Niagara by the British pursuant to the Jay treaty in 1796, the British Crown bound itself by successive treaty obligations with the Six Nation people to protect the hunting and fishing rights of the latter from encroachment. Desire for security in that regard dominated the thought of those people as revealed in the treaties so made (Documents Relating to Colonial History of New York, v. 4, p. 908;

v. 5, p. 800). In the document first cited made in 1701 and drafted, of course, by a British hand, the Six Nations in submitting themselves to the British, in the hope of protection, are recorded as saying:

> It is hereby expected that we are to have free hunting for us and the heirs and descendants from us, the Five Nations, forever and that free of all disturbances expecting to be protected therein by the Crown of England.

In the other document cited, made in 1726, to which the Senecas and two other tribes were parties, the "hunting grounds" of the Indians, which included the Cattaraugus country, were submitted to the Crown:

> To be protected and defended by His said Majesty, his heirs and successors, forever to and for our use, our heirs, and successors and the said three nations.

There is no suggestion here of a power in the Crown to tell the Senecas when or how they might take their beaver, deer, or fish and no Crown official ever dreamed of attempting it. Thus the tribal rights of these people as to fishery and chase stood at the outbreak of the American Revolution when four of these tribes, dominant and independent as to domestic affairs on their own soil, took up the hatchet as allies of Great Britain against her colonists.

The New York colonists promptly adopted, 1777, a constitution containing an Indian article, No. 39,

which declared (Rev. Stats. of N. Y., 1st ed. 1829, v. 1, p. 38):

> No purchase or contracts for the sale of Indian lands hereafter made with or of the Indians within the limits of this State shall be binding on the said Indians or deemed valid unless made under the authority and with the consent of the legislature of this State.

That was a reenactment of colonial legislation (Colonial Laws of N. Y., 1684, chap. 9.) At that time the western frontier of New York, as fixed by occupancy and tenure, did not extend westerly in fact beyond the old "line of property" running through Fort Stanwix (Rome, N. Y.), fixed by Sir William Johnson's treaty with the Six Nations in 1768. (Documents Relating to Colonial History of N. Y., v. 8, p. 135.) That constitution, whatever its effect as to Indian lands then remaining east of Fort Stanwix, could not in law affect the country of the Senecas far to the west of that line where there was then no citizen of New York and when the Senecas were then at war with New York and her confederated States. But that was no assertion of power over tribal Indians. It was meant only to prevent white men from cheating Indians and thus make them a danger to the State frontier. Had New York not afterwards joined first the confederation and later the Union it might perhaps have happened that in time she would have become by right the protector of the Senecas, the purchaser

of more of their land than she did, or, perhaps, their subjugator; but such was not the course of history.

In the summer of 1778 the new States adopted their Articles of Confederation, which provided, Art. IX:

> The United States in Congress assembled shall have sole and exclusive right and power * * * of regulating trade and managing all affairs with the Indians not members of any of the States, provided the legislative right of any State within its own limits be not infringed or violated.

It was one year later, 1779, when General Sullivan drove the hostile Six Nation Indians living east of the Genesee to the west of that river, thus invading and devastating the easterly part of the Seneca country. While the War of the Revolution was in progress the State of New York (as did Massachusetts and Virginia) yielded up to the United States by cession made March 1st, 1781, and accepted by Congress Oct. 29, 1782, all claim to the Ohio country then occupied by Indians who had been subjugated by the Six Nations. New York thereby consented to a limitation of her western boundary at the east line of the Pennsylvania triangle adjoining Lake Erie. That line lies westerly of all Seneca territory involved here, so that any subsequent unqualified cession of any part thereof without reservation by the Senecas, and acting with the consent of the protecting Federal Government, to private purchasers no doubt operated to subject the ceded land instantly to the normal

State jurisdiction of New York. New York has by that process since found her jurisdiction legitimately extended territorially over considerable lands, formerly home lands of these tribes.

At the close of the Revolution all of the Six Nations hostile to the States gathered under the protection of Fort Niagara along the eastern shore of the river where the Americans had driven them. The major part of the Seneca country thus lay deserted at that juncture. It might have been retained by the Federal Government as a forfeit of war. The treaty of Paris had not touched on Indian matters. The Federal Government desired instead to make peace and restore friendship with these people to insure future safety of the frontier, and so invited them to a preliminary treaty in 1784 at Fort Stanwix at the head of the Mohawk. All tribes but the Mohawks attended. In consideration of the peace reached and of a cession to themselves of part of the Seneca land at Niagara for Federal purposes and all land to the westward, including the Ohio country, practically as a forfeit the United States assured to these tribes (Kapplers Indian Treaties, p. 5)—

> that they shall be secured in the peaceful possession of the lands they inhabit east thereof * * *.

The western territory taken from the Senecas was west of and laid off by a line to run due north and south through the mouth of Buffalo Creek (Buffalo, N. Y.). See map attached. The *locus in quo* thus passed directly to the United States as Federal

property and domain for Federal purposes; forts, highways, and defense of the Federal frontier, so that no State jurisdiction of New York could attach as a result. This Cattaraugus land had, up to then, been, as between Six Nation Tribes, the separate domain of the Senecas, and contained many Seneca villages along the Lake Erie shore. After this unwilling cession of the Cattaraugus lands, the Cattaraugus Senecas returned to their villages upon it. Ten years later Colonel Pickering wrote, Nov. 12, 1784, to the Secretary of War concerning the Cattaraugus land (unpublished letter, Pickering MSS., V. 60, pages 207–209; Mass. Hist. Soc.):

> The Senecas have settlements upon it which contain nearly as many people as the whole Oneida Nation.

Great discontent arose among the Seneca people immediately after the Fort Stanwix treaty over the act of their leaders in consenting to a cession to include the Cattaraugus land.

Just at this period, 1786, the States of New York and Massachusetts at Hartford, entered into a convention, despite the prohibition of Article Six of the Confederation and ignoring the procedure to govern adjustment of interstate disputes under article 9, purporting to settle their dispute over the right of each under old crown grants or charters to become purchasers of the remaining lands of the Senecas. The incentive to this dispute was the assumption of each of those States that there were vast profits to be made in buying these Seneca lands from the

Senecas at less than the true worth of them. This dispute was of no concern to the Senecas, for if they were to be cheated by either State they did not care which it was to be, and the Hartford convention, to which they were not party, would not bind them. That convention, however, has since served as the justification put forward by New York officials for the pretension to jurisdiction in various forms in that State over lands still occupied and unceded by the Senecas. It is necessary therefore to give that convention notice and to set it forth. We confidently assert that its ratification by the Congress remains unproven. If not so ratified, it was, as to the Federal Government, a void pact. See discussion, post. At the date of it the territory which was its subject was in the exclusive and peaceful occupation of the Senecas, themselves for the two years then past at peace with the United States, governing their own internal affairs as an independent people and enjoying their ancient home under Federal protection guaranteed at Fort Stanwix and not then considering the sale of any of it. The convention provided (N. Y. Assembly Docs., 1889, No. 51, p. 105):

> First. The Commonwealth of Massachusetts doth hereby cede, grant, release, and confirm to the State of New York forever all the claim, right, and title *which* the Commonwealth of Massachusetts *hath* to the government, sovereignty, and jurisdiction of the lands and

territory so claimed by the State of New York as hereinbefore stated and particularly described.

Secondly. The State of New York doth hereby cede, grant, release, and confirm to the said Commonwealth of Massachusetts and to the use of the Commonwealth, their grantees and the heirs and assigns of such grantees forever, the right of preemption of the soil from the native Indians and all their estate, right, title, and property (the right and title of government, sovereignty, and jurisdiction excepted) *which* the State of New York *hath* * * * in and to all the lands and territories within the following limits and bounds (describing lands containing the *locus in quo*).

* * * * *

Tenthly. The Commonwealth of Massachusetts may grant the right of preemption of the whole or any part of the said lands and territories to any person or persons who by virtue of such grant shall have good right to extinguish by purchase the claims of the native Indians: *Provided, however,* That no purchase from the native Indians by any such grantee or grantees shall be valid unless the same shall be made in the presence of and approved by a superintendent to be appointed for such purpose by the Commonwealth of Massachusetts and having no interest in such purchase, and unless such purchase shall be confirmed by the commonwealth of Massachusetts.

The document was promptly laid before the Congress in an effort on the part of the two States concerned to have it filed with Federal archives and ratified. That effort ended, on October 8, 1787, in an adverse vote in Congress. (Journal of Congress, Ed. 1823, V. 4, pp. 787–791.)

There came before this court in 1896 the Christy case. (162 U. S., 280.) In the opinion appears the unqualified statement, reflecting the authority of this court, that the Hartford convention had been ratified by Congress prior to 1826, the date of the Seneca cession there involved. No record authority for the statement was offered. The statement was no doubt inspired by counsel in that case and by the fact that the same assertion appeared in the opinion of the Court of Appeals of New York in the same case. (126 N. Y., 132 and 140.) We have examined the record of the trial of the Christy case and find that counsel in the trial court had stipulated, along with other matters, that that convention had been ratified as stated above. Thereafter there was, of course, no challenge of the fact in the case and the several courts were in turn thereby led to assume the fact and inadvertently to believe it true. One of those counsel is deceased and an effort by the writer hereof to learn from the other his explanation for the stipulation has been unavailing. Certain unofficial historical publications say that Congress did so ratify, but none gives authority for the statement or cites any record of the ratification. These publications no doubt led

counsel in the Christy case to stipulate as they did. The attorney for relator has made extended examinations of the journals of Congress on this point, aided by the official librarians at Albany and Washington, and he believes that the claim of confirmation is unfounded, and he respectfully invites opposing counsel here to produce proofs in support of the claim if they are to make it here.

In January, 1789, the United States held a confirmatory treaty with the Six Nation people, meeting them at Fort Harmar in the Ohio country, the Senecas participating. The treaty says that these Indians (Kappler's Indian Treaties, p. 23)—

> release, quit claim, relinquish, and cede to the United States of America all the land west of the said boundary or division line (the line running through the mouth of Buffalo Creek. See map attached) * * * for them, the United States of America to have and to hold the same in true and absolute propriety forever.
>
> Art. II. The United States of America confirm to the Six Nations all the land which they inhabit lying east and north of the beforementioned boundary line and relinquish and quit claim to the same and every part thereof. * * *
>
> Art. IV. The United States of America renew and confirm the peace and friendship entered into with the Six Nations (except the Mohawks) at the treaty before mentioned held at Fort Stanwix, declaring the same to be perpetual. * * *

(Separate article:)

> Should a robbery or murder be committed by an Indian of the Six Nations upon the citizens or subjects of the United States, or by the citizens or subjects of the United States or any of them upon any of the Indians of the said nations, the parties accused of the same shall be tried and if found guilty be punished according to the laws of the State or of the Territory of the United States as the case may be where the same was committed. And should any horses be stolen either by the Indians of the said nations from the subjects or citizens of the United States, or any of them, or by any of the said citizens or subjects from any of the said Indians they may be reclaimed into whose possession soever they may have come. And the persons convicted shall be punished with the utmost severity the laws will admit. And the said nations engage to deliver the persons that may be accused of their nations of either of the before-mentioned crimes at the nearest post of the United States if the crime was committed within the Territory of the United States, or to the civil authority of the States if it shall have happened within any of the United States.

In thus taking direct title to itself in the Cattaraugus land the United States ignored the pretension of both New York and Massachusetts as revealed in the Hartford Convention to any sovereign or beneficial right on the part of a State to become purchaser of these Indian lands.

In March, 1789, the Federal Constitution was adopted, New York joining the Union. It vested in Congress the power, Art. 8, Subd. 3

> to regulate commerce with foreign nations and among the several States and with the Indian tribes.

It said, Art. I, sec. 10:

> No State shall enter into any treaty * * *.

It said, Art. II, sec. 2:

> The President shall have power, by and with the advice of the Senate, to make treaties * * *.

It said, Art. VI, sec. 2:

> This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land * * *.

The journals show that it was the determined purpose of the framers of the new article concerning Indians, led by Mr. Madison, to put an end to the pretensions of the separate States, invited by the loosely drawn Articles of Confederation on that subject, to any guardianship duties toward or sovereign authority over tribes of native Indians with whom such States might be in contact. (See Elliot's Debates, v. 5, pp. 119–208; 439–462; 507–560.) Indeed, the British themselves had earlier discovered that to permit a separate colony, neighbor to these tribes, to deal with or be suffered to assume protection of them resulted in frauds and bred trouble on all sides, and

the Crown, as to the Six Nations, put an end to it by creating the Crown office of Superintendent of Indian Affairs with the Six Nations, and in 1761 appointed Sir William Johnson to that post. (Documents Relating to Colonial History of N. Y., V. VII, p. 458.) It was New York in fact whose conduct more than that of any other State provoked this reform in the fundamental law in respect to jurisdiction as to all Indian affairs to be dealt with by white man's government, and it was the purpose that this Federal power should thereafter be exclusive and not a mere power to override by affirmative acts of Congress State action or legislation respecting tribal Indians to remain valid or be enforceable until Congress so acted.

The new Federal Constitution itself operated, Art. 6, Sec. 2, to confirm both the Fort Stanwix and the Fort Harmar treaties previously concluded. Chief Cornplanter visited Philadelphia in 1790, when President Washington said to him, referring to the new Constitution (Am. State Papers, Ind. Affairs V. I, p. 142):

> Treaties held with you without the authority of the United States will not be binding and, as to your remaining lands, you have the right to sell and the right to refuse to sell.

The Cattaraugus Senecas, highly wrought up on learning of the final cession at Fort Harmar of the lands covering their settlements, threatened the lives of the chiefs who had signed the treaty. Thereupon Cornplanter again visited Philadelphia, 1791, and

laid the situation before President Washington, saying of those lands (do. p. 142):

> Restore to us this little piece. * * * Let us continue to take the fish of these waters in common with you.

Title to those lands was soon restored to the Senecas, as will be seen later. One of the earliest acts of Congress under the new Constitution, provoked by the fresh misconduct of New York in holding of treaties at this time with the Oneidas, the Onondagas, and the Cayugas in disrespect of the new and exclusive authority of the Federal Government, was the Indian intercourse act of the first Congress, second session, 1790, which provided as follows:

> SECTION. 4. That no sale of lands made by any Indians or any nation or tribe of Indians within the United States shall be valid to any person or persons or to any State, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty held under the authority of the United States.
>
> (1 Stats., 138, § 4.)

That act was temporary but was continued and a penalty imposed by act of the second Congress at its second session, in 1793, as follows:

> SECTION 8. That no purchase or grant of lands or of any title or claim thereto from any Indians or nation or tribe of Indians within the bounds of the United States shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into

pursuant to the Constitution; and it shall be a misdemeanor in any person not employed under the authority of the United States in negotiating such treaty or convention, punishable by a fine not exceeding $1,000 and imprisonment not exceeding twelve months, directly or indirectly, to treat with any such Indians, nation, or tribe of Indians for the title or purchase of any lands by them held or claimed.

Provided, nevertheless, that it shall be lawful for the agent or agents of any State, who may be present at the treaty held with the Indians under the authority of the United States in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to and adjust with the Indians the compensation to be made for their claims to lands within such State which shall be extinguished by the treaty.

(1 Stat., 329, § 8.)

That section was reenacted by the Fourth Congress at its first session in 1796. (1 Stat., 469, § 12.) The same provision was again reenacted by the third session of the Fifth Congress in 1799. It was again reenacted by the first session of the Seventh Congress in 1802, and this act was not limited in its duration. It was reenacted in 1834 by the first session of the Twenty-third Congress, and in 1874, with slight modification, became section 2116 of the Revised Statutes, in which form it has since remained the statute law.

In 1791 President Washington wrote Alexander Hamilton, of New York, complaining that the assurances he had given the Six Nation people that henceforth they would be dealt with only by the Federal Government were being ignored by New York (Sparks Writings and Life of Washington, V. 10, p. 155). Sparks says (do V. VII, p. 39) that the Attorney-General had written an opinion holding that an Indian treaty held without intervention of the United States would be unconstitutional.

With the Six Nation people who had been hostile to the States still hovering around Fort Niagara under British influence, it was deemed advisable by President Washington in 1794 that a further treaty with them be held, and this was done on Nov. 11th, at Canandaigua, through Colonel Pickering, the Senecas participating. The treaty concluded provided (Kappler, page 34):

> ARTICLE 1. Peace and friendship are hereby firmly established and shall be perpetual between the United States and the Six Nations.
>
> ARTICLE 2. The United States acknowledges the lands reserved to the Oneidas, Onondaga, and Cayuga Nations in their respective treaties with the State of New York and called their reservations to be their property and the United States will never claim the same nor disturb them or either of the Six Nations nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof, but the said reservations shall remain theirs until they choose to

sell the same to the people of the United States who have the right to purchase.

ARTICLE 3. The land of the Seneka Nation is bounded as follows:

Beginning on Lake Ontario at the northwest corner of the land they sold to Oliver Phelps [Millyard tract] the line runs westerly along the lake as far as Oyongwongyeh Creek at Johnson's landing place, about four miles eastward from the Fort of Niagara; thence southerly up that creek to its main fork, then straight to the main fork of Stedman's Creek which empties into the Niagara River above Fort Schlosser, and then onward from that fork continuing the same straight course to that river. (This line from the mouth of Oyongwongyeh Creek to the River Niagara above Fort Schlosser being the eastern boundary of a strip of land extending from the same line to Niagara River which the Seneca Nation ceded to the King of Great Britain at a treaty held about thirty years ago with Sir William Johnson); then the line runs along the River Niagara to Lake Erie; then along Lake Erie to the northeast corner of a triangular piece of land which the United States conveyed to the State of Pennsylvania as by the President's patent dated the third day of March, 1792, then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the Seneca Nation to Oliver Phelps and then north and northerly along the Phelps line to the place of beginning on Lake Ontario. Now the United States acknowledge all the land within the afore-

mentioned boundaries to be the property of the Seneca Nation and the United States will never claim the same nor disturb the Seneca Nation nor any of the Six Nations or of their Indian friends residing thereon and united with them in the free use and enjoyment thereof but it shall remain theirs until they choose to sell the same to the people of the United States who have the right to purchase.

ARTICLE 4. The United States having thus described and acknowledged what lands belong to the * * * Senecas and engaged never to claim the same nor to disturb them or any of the Six Nations or their Indian friends residing thereon and united with them in the free use and enjoyment thereof, now the Six Nations and each of them hereby engage that they will never claim any other lands within the boundaries of the United States nor ever disturb the people of the United States in the free use and enjoyment thereof.

ARTICLE 5. The Seneca Nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie as far south as Buffalo Creek and the people of the United States shall have the free and undisturbed use of this road for the purposes of travelling and transportation. And the Six Nations and each of them will forever allow to the people of the United States a free passage through their lands and the free use of the harbors and rivers adjoining and within their respective tracts of land for the passing and securing of

vessels and boats the liberty to land their cargoes where necessary for their safety.

* * * * *

ARTICLE 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals the United States and the Six Nations agree that for injuries done by individuals on either side no private revenge or retaliation shall take place but instead thereof complaint shall be made by the party injured to the other, by the Six Nations or any of them to the President of the United States or the superintendent by him appointed and by the superintendent or other person appointed by the President to the principal chiefs of the Six Nations or of the nation to which the offender belongs and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

The United States thereby satisfied the Senecas as to their complaint about the Cattaraugus lands, by the shoving of the Senecas' westerly bound farther west to follow Lake Erie from Buffalo Creek southwest to the Pennsylvania line. The territory thus restored included the *locus in quo* here and lodged title to it in the Senecas as their separate and exclusive land with the consent of the others of the Six Nations. In taking a direct cession to itself of the Niagara River frontage by this treaty, the United States again ignored the pretentions of Massachusetts and New York in respect

to their claim of right to become purchasers of Seneca lands. This treaty was proclaimed by the President on January 21, 1795.

By practical ratification as to the Indians of the cessions and reservations under State treaties then lately held with the Oneidas, the Onondagas, and the Cayugas by New York, the Pickering treaty removed the necessity for any subsequent dispute between Federal and New York authorities as to the obvious infraction of the Federal Constitution and laws committed by New York in holding those treaties. The forbearance of the Federal authorities in not challenging the State of New York at the time was inspired no doubt by a praiseworthy desire to avoid a quarrel which would have kept these Indians in a state of unrest and an easier prey to British instigation of further trouble between them and the new Union of States, a union too frail to warrant such a contest with the powerful State of New York, however wrongful its act.

Ever since the Hartford Convention in 1786 the State of Massachusetts had been negotiating with men of wealth and would-be land speculators in an effort to commercialize the exclusive right to buy Seneca lands which she thought she had obtained as a result of her compromise with New York.

After four years of bargaining Massachusetts agreed to sell her "pre-emption right" for $1,000,000. (N. Y. Assembly Docs. 1889, No. 51, p. 17–18). Phelps and Gorham paid her $775,000 for her consent that they buy what they wanted (2,600,000

acres) and Robert Morris, later taking over the balance of this contract (4,100,000 acres), paid her $225,000. Phelps and Gorham soon after paid the Senecas at Buffalo Creek for the cession to them the equivalent of $15,000 (Am. State Papers, v. 5, p. 210), and Morris later at the treaty of Big Tree paid them $100,000. (N. Y. Assembly Docs. 1889, No. 51, p. 132.) The Senecas did not sell to Morris all the land he wanted, for, wedded to their old homes, they retained an aggregate of 215,680 acres in residence reserves. But these two sales embraced approximately 29/30 of all the Seneca lands. While the Senecas received $115,000 for substantially all they had to sell, Massachusetts received nearly eight times as much for bartering away the right, so-called, of buying from them.

Then followed the treaty of Big Tree. That treaty was submitted to the Senate and ratified on April 11th, 1798. It had been concluded by duly authorized Federal agents. Such ratification, so far as good title in Morris to the lands so ceded by the Senecas was concerned, removed all necessity for congressional ratification of the Hartford Convention, and without which the latter would continue a void pact as to the lands and rights then and since retained by the Senecas excepted from the sale to Morris and embracing the *locus in quo* and the tribal rights therein. The fact that Massachusetts and New York have since in their own conduct in some respects mutually respected the terms of that pact as to the land reserved at Big Tree does not give the pact

validity before a Federal court prejudicially to the Senecas.

It was some years later when the possiblity of future sales of reserved lands by the Senecas became the subject of commercial speculation by the holders, private grantees, of the unexercised "pre-emption right" under the Hartford Convention and before the Ogden Land Company, one of such holders, advanced the contention that such possibility gave that company a present interest of a vested nature in the remaining reserved lands. New York State later adopted the same theory and has further contended in substance that because the Ogden Land Company was composed of white men holding in a private capacity a fee in such reserves, the land, though still occupied by the Senecas, must be subject to a present State jurisdiction. Transactions subsequent to the treaty of Big Tree have not resulted in any change of situation of the Senecas in respect to the *locus in quo* but, to complete the record, those transactions will be set forth, including those had by Six Nation Indians with the State of New York of direct bearing upon the subject of reserved hunting and fishing rights.

Morris quickly sold the lands he had bought. He had, in fact, made deeds of part before the Senecas had ceded to him. A large tract was sold by him to William Willink et al. (commonly called the Holland Land Company), who desired to command a better access to Lake Erie, from which their land was cut off in great measure by the Lake front strip of the

old Cattaraugus residence reservation. As a result a treaty was held at Buffalo Creek by authority of the United States in 1802, at which the lands now forming the new Cattaraugus residence reserve were, by document in form of a common deed, exchanged by that company for the lands in the old reserve by the following description and terms (Kappler, p. 60):

> the said parties of the second part (Willink et al.), reserving to themselves the right of pre-emption (do grant):
> all that certain tract or parcel of land beginning at a post marked O, standing on the bank of Lake Erie at the mouth of Cattaraugus Creek and on the north bank thereof; thence along the shore of said lake north eleven degrees east twenty-one chains; north thirteen degrees east forty-five chains; north nineteen degrees east fourteen chains sixty-five links to a post; thence south fourteen chains twenty-seven links to a post; thence south fourteen chains twenty-seven links to a post; thence east six hundred forty chains to a post standing in the meridian between the eighth and ninth ranges; thence along said meridian south six hundred and seventeen chains seventy-five links to a post standing on the south bank of Cattaraugus Creek; thence west one hundred sixty chains to a post; thence north two hundred ninety chains twenty-five links to a post; thence west four hundred and eighty-two chains thirty-one links to a post; thence north two hundred and nineteen chains fifty links

to a post standing on the north bank of Cattaraugus Creek; thence down the same and along the several meanders thereof to the place of beginning.

To hold to the said parties of the first part in the same manner and by the same tenor as the lands reserved by the said parties of the first part in and by said treaty or convention entered into on the Genesee River (Big Tree) the 15th day of September, 1797, as aforesaid, were intended to be held.

This grant did not operate to create in the Senecas the right to fish and hunt on the new residence reserve for they had previously held such right in that land and had held it independently of the sovereignty of New York. They did not, by this transaction, purport or intend to yield that independence in their future exercise of that right.

The language of that treaty evidences no intention on the part of the Senecas to relinquish their right of fishing and hunting in the other lands and waters previously ceded to Morris and to which such right *then attached.* In Eighteen Mile Creek then the Senecas continued in the right to take fish under the treaty reservation of 1797, but thereafter the fishing was likely to be shared in common by more of the citizens of New York. The Senecas could thereafter reach the *locus in quo* from the north, over the adjoining lands anywhere and from the south, for one mile from Lake Erie, on any public highway to be opened thereon.

Before further Federal action involving Six Nation interest had been taken affecting this frontier the War of 1812 arose between Great Britain and the United States. During the progress of that war British troops invaded Grand Island and thereby offended the Senecas, who still possessed this as well as the other islands in the river. The Senecas, acting in connection with the other Six Nation Indians in New York, treated such invasion as an act of hostility toward them and declared war for themselves against "upper and lower Canada." (Stone's Life of Red Jacket, p. 314.) They took part for a time late in the war as allies of the United States.

Morris, as stated, had in fact, before the treaty of Big Tree, assumed to convey away the Seneca lands by deeds which on their face ignored the existing title of the occupant Indians. One of those conveyances related to the Cattaraugus lands and was made in 1792, running to Leroy et al. (N. Y. Assembly Docs., 1889, No. 51, p. 117.) After the exchange by the Senecas with the grantees of Leroy of the old for the new Cattaraugus Reservation the grantees of the old, Willink et al., proceeded, in 1810, to deed to David A. Ogden, a lawyer of New York City, the "preemption right" to the new Cattaraugus and other residence reserves of the Senecas, "subject to the right of the native Indians" then in possession of all and ever since in possession of parts of those lands. The next cession by the Senecas was by treaty at Buffalo Creek August 31, 1826, with a com-

missioner purporting to represent the United States (N. Y. Assembly Docs., 1889, No. 51, p. 144) whereby Robt. Troup et al., holding by assignment from Morris the "preemption right," bought several of the lesser residence reserves and parts of the larger without affecting the situation as to the unceded lands and rights of the Senecas. This treaty was never ratified nor was it proclaimed by the President. This was the treaty involved in the Christie case before this court (162 U. S., 280). These claimants of the "preemption right" have ever since sought, by various devices of litigation, to prevail on the courts, Federal and State, to hold that they are the owners of some sort of present fee in these unceded lands and that the tribal right of the occupant Senecas is possessory only.

The next cession by the Senecas was made in 1838 at Buffalo Creek to Thomas L. Ogden and others (the Ogden Land Company), holding under Morris the "preemption right" by treaty with the United States evidenced in form of a common deed. (Kappler, p. 509.) This cession in terms covered lands occupied by the Senecas and known, respectively, as the Buffalo Creek, Cattaraugus (new), Allegany, and Tonawanda Residence Reservations, of certain acreage each, but no mention was made of then-existing hunting and fishing rights of the Senecas in lands previously ceded qualifiedly to Morris. None of these reserves was actually surrendered as the result of this treaty.

The reason of that was that the move of the Federal Government, then under way, to induce all eastern Indians to leave their homes and remove to the far West was, as to the Six Nations, instigated by the private speculators in the "preemption right" in those lands. The proposed removal was generally opposed by the Seneca people. The proposal precipitated a long and bitter contest waged by the Senecas before Congress and in the courts, in which they charged, with proofs, that the above treaty had been procured unfairly if not by the practice of fraud and corruption (see Fellows *v.* Blacksmith, 19 Howard, 366; People *v.* Dibble, 21 do., 366; New York Indians, 170 U. S., 1).

By subsequent treaty (Kappler, p. 536) between the Senecas and Thomas L. Ogden and others in the year 1842, at Buffalo Creek, the last-mentioned treaty is *superseded* to the extent that the latter treaty is inconsistent with the former. The former treaty at that time stood wholly unexecuted by the Senecas and had been repudiated by them. By the later treaty it was agreed that the Senecas—

> Shall and may continue in the occupation and enjoyment of the whole of the two several tracts of land called the Cattaraugus Reservation (new) and the Allegany Reservation, *with the same right and title in all things as they had and possessed therein immediately before the date of said indenture.*

At the same time the Senecas confirmed to Ogden and others the land in the Buffalo Creek Reservation and Tonawanda Residence Reservations, in the following language:

> The Seneca Nation of Indians, in consideration of the foregoing and of the agreements next hereafter contained, do on their part grant and release and confirm unto the said Thomas L. Ogden and others and to their heirs and assigns in joint tenancy the whole of the said two tracts of land severally called the Buffalo Creek Reservation and the Tonawanda Reservation, and all the right and interest therein of the said nation.

It was further agreed by Article VII as follows:

> This indenture is to be deemed to be in lieu of and as a substitute for the above recited indenture made and dated the 15th day of January, 1838, so far as the provisions of the two instruments may be inconsistent or contradictory; and the said indenture, so far as the same may be inconsistent with this compact, is to be regarded and is hereby declared to be rescinded and released.

This treaty was proclaimed by the President August 26, 1842. The Ogden Company, as the treaty shows, was ready to become the purchaser of those lands and the United States permitted them so to do, as it had the sole jurisdiction, whether that company was or was not to be required to face competition in buying out the Senecas. The fact,

then, that the company did purchase does not establish that it was previously vested with an exclusive right to become such purchaser—i. e., to deprive these Indians of the advantage to arise presumably from competition among bidders.

No release *of hunting and fishing rights* in any previously and qualifiedly ceded land is to be spelled out of the language of those two documents. The subsequent history of the Tonawanda and Buffalo Creek residence reservations is not important here. The treaty of 1842 is the last Federal treaty to which the Senacas were a party and pertinent here.

No subsequent agreement has been entered into between the State of New York and the Senecas, and Congress has taken no action whereby these hunting and fishing rights at the *locus in quo* have been affected.

New York State Treaties.

These are set forth to show that New York State knew from its own direct dealings with the Six Nations of the policy and purpose of these peoples, including the Senecas, to retain and protect their hunting and fishing rights as a tribal heritage to be handed down as such to their posterity.

Soon after the close of the Revolution the State of New York (ignoring the jurisdiction of the Federal Government) undertook to and did negotiate in its own behalf and alone with the Oneidas, the Onondagas, and the Cayugas for cessions of lands

belonging to those several tribes. The New York treaties made prior to 1794 were practically confirmed by the Canandaigua treaty, and as to lands reserved therein by these Indians and the free use and enjoyment of such lands and rights of the tribes thereunder was, as already shown, therein expressly guaranteed to those Indians by the United States. The first of these New York State treaties was negotiated with the Oneidas in the year 1788, and, after reserving such parcels for their residence as they thought needful, the Oneidas qualifiedly ceded the remainder of their separate lands to the State. *The State consented on its part* to the reservation by the Oneidas of the rights defined, as follows:

> The Oneidas and their posterity *forever* shall enjoy the free right of hunting in every part of the said ceded land and of fishing in all the waters within the same. (N. Y. Assembly Documents, 1889, No. 51, p. 238.)

The lands thus referred to are now covered in the main by the counties of Oneida, Madison, and Chenango.

The next was the treaty negotiated between New York and the Onondagas in the same year, whereby the Onondagas ceded the greater part of their separate territory to the State but reserved to themselves hunting and fishing rights in language identical to that used by the Oneidas. (Do., p. 190.) The lands thus qualifiedly ceded are now covered in the main by the counties of Oswego, Onondaga, and Cortland.

The next was the treaty made between New York and the Cayugas in 1789, whereby the Cayugas, after reserving to themselves a tract of 64,000 acres, ceded the remainder of their lands to the State, reserving hunting and fishing rights in language identical with that previously used by the Oneidas and the Onondagas. (Do., p. 216.) The territory thus qualifiedly ceded is now covered in the main by the westerly part of Oswego County, the easterly parts of Wayne and Seneca, and by Cayuga and part of Tompkins.

No similar cessions and reservations were made in case of the Mohawks, for they never returned to the United States after the Revolution, but subsequently did quitclaim to the State of New York all their right to their ancient lands. (Do., p. 381.)

The lands constituting the residence reservations under these treaties thus made directly with New York have been reduced by subsequent Indian cessions made from time to time by the respective tribes. The Cayugas have, in fact, since ceded all their lands to New York State. In these subsequent cessions no fishing or hunting rights were reserved as to the land ceded, so that no such tribal rights have since attached to *those* particular areas, and normal State jurisdiction thereover is no doubt unqualified.

In August, 1802, the Senecas held a treaty at Albany with the United States at the request of the State of New York, which in that instance respected Federal jurisdiction. This was the first purchase by

the State of Seneca lands. The Senecas there ceded to the State the Mile Strip, so-called, extending from Stedman's farm (two miles above Niagara and on the east bank) and skirting the river southerly to Buffalo Creek. New York had not quit-claimed that land to Massachusetts at Hartford. On August 19th Red Jacket announced to the governor of New York the result of the deliberations held by the Senecas. He said (MSS. Report. V. 40 Misc. Archives State Library, Albany):

> We propose to sell the whole tract with the reservation, however, of all the islands; the line to run to the edge of the water, but the use of the river to be free to you. We wish to reserve also the privilege of using the beach to encamp on and wood to make fires, together with uninterrupted use of the river for the purpose of fishing. * * *

The treaty executed on the next day recited the following cession to the State (New York Assembly Documents, 1889, No. 51, p. 214):

> All that tract of land one mile wide on Niagara River extending from Buffaloes Creek to Stedman's farm including Black Rock and bounded to the westward by the shore or waters of said river. And said Seneca Nation of Indians reserving to themselves nevertheless, the right and privileges of encamping their fishing parties on the beach of said river for the purpose of fishing which is the common right of both parties and to be enjoyed with-

> out hindrance or interruption from either and while there encamped to use the drift wood for fuel, but not to trespass on or injure the proprietor or proprietors of the adjacent land.

(Text corrected from original in N. Y. Secretary of State's office in V. 2, Indian Deeds and Treaties, p. 223.)

A further purchase by New York occurred in Sept., 1815, at Buffalo Creek, the State ignoring in this instance the authority of the United States who were not represented. The treaty recited a cession described as follows (N. Y. Assembly Docs., 1889, No. 51, p. 211):

> All the islands in the Niagara River between Lake Erie and Lake Ontario and within the jurisdiction of the United States to have and to hold the same with the appurtenances unto the said people of the State of New York in free and pure allodium forever.
>
> Reserving, however, to the chiefs, sachems, and warriors of the Seneca Nation of Indians equal rights and privileges with the citizens of the United States in hunting, fishing, and fowling in and upon the waters of the Niagara River and of encamping on any of the said islands for that purpose whilst the same shall continue to belong to the people of the State of New York.

(Text corrected from original treaty in N. Y. sec'y of state's office in v. 2, Indian Deeds and Treaties, p. 223.)

Views of State Officers of New York Respecting Reserved Hunting and Fishing Rights of Six Nation Indians.

In years gone by reserved rights of other Six Nation Indians have come before State officers for consideration. By State Senate Document of 1866 No. 50 (Legislative Documents of 1866) appears a report of the commissioners of the land office to the State senate. It recites that the Oneida Indians claim, in an application to the legislature made in 1866, that their reserved right of hunting and fishing on lands (and waters) qualifiedly ceded to the State had never been extinguished, and that the settlement of the country by white inhabitants and the erection of dams and canal works were inconsistent with such reserved rights and had practically destroyed their value, and they claimed compensation at the hands of the State. The report says:

> As to the first claim, viz, the practical destruction of the reserved "free right" to hunt in the extensive territory ceded to the State by the Oneidas in the treaty of Fort Stanwix, and to fish in all the waters in that territory, it is necessary to admit two facts, to wit, that such "free right" has not been expressly surrendered or extinguished by treaty, but that it has been gradually interrupted and overborne by the settlement and improvement of the country and the exclusive and necessary rights of property asserted and enjoyed by the grantees of the State. * * * The State acquired the territory for the settlement of its

> people, to be devoted to the uses of an advancing civilization. The value of the hunting grants would be necessarily diminished and finally destroyed. The same consequences, less apparent but not less inevitable, would happen to the use in value of the streams for fishing * * *.
>
> Can the State justly resist the force of the impression which would probably be made upon the minds of these unlettered Indians by the solemn treaty of stipulation that "the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of the said ceded lands and fishing in all the streams of the same." * * * On every just, legal, and equitable principle the State should admit the intention which the language of the treaty would reasonably import to the comprehension of these uninstructed parties. The free right to hunt and fish as provided in the treaty may not now be of any great value to the Indians * * *.

The report, after considering other matters, says that the allowance of any compensation for the loss by the Oneidas of the value of these rights arising in this way is a subject for the legislature rather than the commissioners of the land office. The report is signed by Thomas G. Alvord, lieutenant governor; Francis C. Barlow, secretary of state (later attorney general of the State); John H. Martindale, attorney general; J. P. Goodsell, State engineer and surveyor; and Thomas Hillhouse, comptroller.

The Oneidas revived this same question in 1873, as appears by assembly document 59 of legislative documents of 1873, setting forth a report of the commissioners of the land office. This report in turn incorporates the report of a subcommittee under date of April 3, 1872, which says:

> The claims of the Oneidas are:
>
> First. They claim the free right to fish and hunt in every part of the land ceded by them in the treaty of 1788, and compensation for the loss of that right * * *.

The right thus claimed is thus, in the treaty of September 22, 1788, worded:

> And the Oneidas and their posterity forever shall enjoy the free right of hunting in every part of said ceded land and of fishing in all the waters within the same.
>
> The State having thus acquired the fee of the lands and the right to grant them to settlers can not be liable for any decrease in value of the right to hunt and fish therein in consequence of such settlement. Both parties well knew that a decrease of game and fish is the inevitable result of the settlement and cultivation of wild land. It is not sufficient for the Oneidas to show that their right has lost its value and to argue that therefore it is practically taken away from them. They must show not that game is scarce or extinct but that they are impeded in their hunting or fishing by causes not foreseen at the time of the treaty. They show nothing of the kind. There is no evidence

> that the Oneidas are debarred from hunting or fishing by any other causes than the scarcity of game and the rights of the settlers to their grants from the State. In short, the Oneidas have not been deprived of their rights to hunt and fish in western New York; they still possess it, but its value has decreased by reason of a contingency foreseen and acquiesced in by both parties to the original treaty, therefore no compensation is due them.

This report is subscribed by John C. Robinson, lieutenant governor; Alonzo B. Cornell, speaker of the assembly; G. Hilton Scribner, secretary of state; Nelson K. Hopkins, comptroller; Thomas Raines, treasurer; W. B. Taylor, state engineer and surveyor, and Francis C. Barlow, attorney general.

Both the foregoing reports concede that these outstanding reserved rights of fishing and hunting on so-called ceded lands have vitality and imply that the State would break its treaties if it did any act preventing the Oneidas from enjoying these rights for what they might be worth to them.

Views of Attorneys General of New York on State Jurisdiction to Control Fishing and Hunting by Indians on Residence Reserves.

On the enactment by New York, in 1908, of the statute providing for a hunting tax and the issuance of licenses, through the forest, fish, and game commissioner, to hunters, the commissioner was of the view that Indians hunting upon their own reservations were subject to that statute. The attorney general

of the State took a different view, as appears by the following opinion (Report of the Atty. Gen., 1908, p. 346) addressed to the commissioner:

> My attention has been directed to the published announcement that you take the position that Indians must take out licenses under the game law to be entitled to hunt on their reservations. I feel it my duty to inform you under these circumstances that certain of the reservations in this State are held by the tribes under treaties made between them and the State, and that by the terms of the treaties the Indian right of user is absolute. So far as the right of hunting is concerned the original treaties have not been modified. Those treaties have been declared to be solemn contracts of the State by the governors of the State. Judges of our highest courts have taken the same position in respect to attempts to tax Indians. Other reservations are held under unqualified treaty right of user guaranteed to the Indians by the Federal Government. In neither of these cases has the State any right to enforce a tax against a reservation Indian who hunts upon his reservation. In view of these treaties I can not construe the language of the game law as showing a legislative intent that the license tax should apply in the cases mentioned. Any attempt to enforce such application of the game law would, in my opinion, violate the treaties.

The present attorney general of New York, appearing in the case of *United States* v. *Hamilton et al.*, in the

District Court, Western Dist. of New York, decided November 3rd, 1915, and not yet reported, involving the arrest of Cattaraugus Senecas for taking fish with a net on that residence reservation, submitted an opinion under date of Oct. 15, 1915, and filed by him therein, in which he said:

> Accepting as the law of the land the principles laid down by the courts of the United States as to the status of the tribal Indians within its boundaries, there seems to be no escape from the conclusion that the conservation law of the State of New York does not apply to tribal Indians residing on their reservations.

Legislative Recognition of the Independence of the Senecas.

The New York Legislature early betrayed a consciousness of an existing tribal independence of the Senecas. It passed in 1849 the following concurrent resolution when part of the Senecas, including the Cattaraugus Senecas, decided to abandon their old system of chiefs and have in future a president and elective governing council. (L. 1849, p. 731.)

> *Resolved*, That the recognition by the Government of the United States, of the new constitutional government lately formed by the Indians residing in the Cattaraugus and Allegheny reservations establishes the new government as that which the State of New York must receive and acknowledge in its dealings with such Indians and that the officers of this State ought and are hereby instructed to respect such new government accordingly.

General Relations since the Revolution Between New York and the Six Nation Indians.

The fact that substantially all of the Senecas, about half of the St. Regis (Catholic Mohawks), a good part of the Onondagas, many Oneidas, Cayugas, and Tuscaroras were too strongly attached to their old homes to leave them, has resulted in an experience by New York State with Indians not shared for some seventy-five years past by other original or eastern States. The extensive residence reserves, some 87,000 acres in the aggregate, of these Indians, numbering about five thousand souls, adjoining or surrounded by the domain of New York, produced a situation leading the people of New York to consider themselves under a measure of responsibility for these Indians. Such a responsibility was real and the discharge of it legitimate in respect to preventing New York citizens, neighbors of these Indians, from aggressive trespasses upon the reserves and to protect whites from evil-minded Indians. A State statute forbidding such trespasses by whites (act of Mar. 21, 1821) was of course within the lawful power of New York to enact; for even if unnecessary in face of Federal laws of like character which existed and constrained New York people, it was valid against the latter. (Goodell *v.* Jackson, 20 John. (N. Y.), 694; People *v.* Dibble, 62 U. S., 366.) The omission of this court in the Dibble case to speak in its opinion with precision as to the limit of this State right has been seized upon unfairly since by New York courts

in upholding a State power *over* tribal Indians to control their peaceful activities.

The State went further and volunteered to furnish teachers for the Indian children and to improve the roads on these residence reservations and the tribes have gratefully accepted these offers. By the treaties under which the State acquired considerable Six Nation lands it had assumed the obligation to make perpetual annuity payments to certain of these tribes. Agents to pay these moneys and disburse them among the Indians were provided for by statute, but additional duties of a paternal nature, quite outside the scope of the State's treaty obligations or of its duty or right, were charged upon these agents. The legislature has assumed in several instances to be the proper source of authority for these tribes to lease or to sell their tribal lands to white men or to partition such lands among themselves. This was in absolute disrespect of Federal authority and contemptuous of the penalties of the Federal Indian intercourse act, but State judges of New York have usually upheld such legislation and Federal officials have refrained from prosecuting violations of Federal laws as to sales of Indian lands and trespasses thereon and have left these Indians more and more to *de facto* care by and domination of New York. Whole villages of whites became established on the Allegany Residence Reserve of the Senecas under leases invited by the New York statutes. The State projected her political subdivision lines into and across

the Six Nation reserves, but she could not thereby extend her power over those Indians.

The Six Nation Indians themselves, reduced and weakened gradually by successive migrations of their members to the west and to Canada, and perplexed by the dual authority encountered in coming in touch with the white man's government, have remained largely passive. New York has suffered the prohibition of her constitution of 1777 as to acquiring land from Indians to remain in her later constitutions. She has invited the Six Nation Indians to enter her State courts as plaintiffs, both as tribes and individually, in seeking redress for grievances, and this invitation has been accepted by appearances through private counsel, with the result that a mass of reported litigation exists as superficial evidence of a jurisdiction in New York courts over the subject of Indian affairs. Curiously, however, here no statute is to be found, from the earliest days down to the present, which in terms has assumed to require tribal Indians on their own reserves to respect the fish and game laws enacted by New York. The various statutes enacted as above outlined have accumulated and been codified into the so-called Indian law of New York. To read that code would disabuse the most unwary of the suspicion that the fundamental Federal law took from New York and her sister States all power over tribal Indians and vested it in the Federal Government.

Occasionally Federal courts have been called on, in issues provoked by New York, to annul such State

legislation, e. g., the attempt of New York to tax Six Nation reserves. (New York Indians, 72 U. S., 761.) But those instances, together with those of similar aggressions attempted by other States against other Indians (Kansas Indians, 72 U. S., 737; Worcester *v.* Georgia, 6 Peters, 515), have not sufficed to prevent successive generations of New York officials, legislative and judicial, from disrespecting the rights of these tribes and ignoring the jurisdiction of the Federal departments in matters of Indian interests, as the cases to be cited below unfortunately show.

These reserved hunting and fishing rights, nevertheless, have been peacefully and decently enjoyed by these various tribes now for upward of a century over the lands near by the residence reserves and without challenge, until very recently, and never by any State officer of high dignity until the conservation commission, with authority State-wide over State territory as to fish and game affairs, challenged them. Until now these questions have only come before petit courts of the State. Never until now, it is believed, has a general State officer or department lent official resources and power to an attempt to nullify these tribal rights.

DISCUSSION.

FIRST.

The New York Conservation Law.

This statute, in its dealing with fish and game (Art. V, chap. 318, Laws 1912), must be considered as a whole to realize the scope and seriousness of the

issue between Six Nation Indians and that State brought here by this cause. The issue transcends the mere matter of the right of Indians to take fish with a spear. This statute, if applied to these tribal rights, is offensively prohibitory. It begins (Part III, sec. 175):

> The ownership of and the title to all fish, birds, and quadrupeds in the State of New York not held by private ownership legally acquired is hereby declared to be in the State.
>
> No fish, birds, or quadrupeds shall be caught, taken, or killed in any manner or at any time or had in possession, except the persons so catching, taking, or killing or having the same in possession shall consent that the title to such fish, birds, and quadrupeds shall be and remain in the State of New York for the purpose of regulating and controlling the use and disposition of the same after such catching, taking, and killing, except that the title to such fish, birds, or quadrupeds legally taken shall vest in the person so taking or possessing the same subject to the restrictions and provisions of law.

Section 176 says:

> No person shall at any time of year pursue, take, wound, or kill in any manner, number, or quantity any fish, quadrupeds, or birds protected by law, or buy, sell, offer, or expose the same or any part thereof for sale, transport, or have the same in possession, except as permitted by this article * * *.

Section 177 says:

> Game protected by law * * * shall only be taken * * * with a gun fired at arms length without rest * * *. Fish * * * shall only be taken by angling * * *.

Section 182 says:

> A person who violates any of the provisions of Part III * * * is guilty of a misdemeanor * * * and liable as follows: To a penalty of sixty dollars and to an additional penalty of twenty-five dollars for each fish, bird, or quadruped * * * taken * * * in violation thereof.

Section 185 says:

> No person or persons shall at any time hunt, pursue, or kill with a gun any wild animals, fowl, or birds, or take with traps or other devices any fur-bearing animals * * * without first having procured a license so to do * * *. Said applicant, if a nonresident of the State * * * or an unnaturalized person or an alien resident or nonresident, shall pay to the clerk countersigning and delivering the license the sum of twenty-five dollars * * *.

Section 190 says:

> Only wild deer having horns not less than three inches in length may be taken * * *, and in the counties of Clinton * * * (not including any county projected over any Seneca residence reserve or over any land ceded by the treaty of Big Tree).

Section 196 says:

> No person shall take or possess beaver at any time * * *.

Section 214 says:

> There shall be no open season for quail before October first, 1918.

Punishments, criminal and penal, are provided to cover violations of those provisions. It would be doing no violence to propriety if this court shall take notice that few tribal Indians could afford an annual license fee of twenty-five dollars as a condition of a right to hunt and that these fixed penalties are beyond the means of Indians to pay.

In reversing the special term the appellate courts of New York of necessity decided, but without offering any supporting argument, that the conservation law was intended by the State legislature to apply to Six Nation Indians in exercising their reserved rights to fish and hunt on the land ceded at Big Tree. We assume that the correctness of that holding of a State court in the construction of a State statute is not open to review here, but in the interest of truth, we strove below to prevent such a holding, and we remain unshaken in the conviction that the holding was erroneous. The conservation law will be searched in vain for any mention of Indians; for the faintest suggestion that the State legislature intended, directly or by indirection, destruction of the rights reserved at Big Tree; a result to follow from the prohibitions, the narrow liberties, the pro-

hibitory license fee and the uncollectible money penalties of the act applied to Six Nation Indians who in 1797 stipulated for the assurance of means for procuring of necessary food and of opportunity to take pelts for barter and sale in supporting themselves. The attorney for the relator here, when that article of that statute was enacted in 1912, held the office of counsel to the conservation commission of New York; helped to draft the bill resulting in that statute and attended all the hearings thereon and knows whereof he speaks in saying that the New York legislators entertained no conscious purpose of affecting such Indians except when, as in case of Russians, they stepped on lands subject to full State jurisdiction.

The reading of this statute disproves that it was intended, even if New York was under the protective duty to regulate, in supposed interest of the Six Nation Indians themselves (as apprehended by the legislature), to apply to the taking of fish and game under these reserved rights. Had it been intended so to apply this statute, under a power outside of protective duty to these Indians, the State would have been attempting confiscation of the rights of these Indians on ceded land, for it requires them to consent (sec. 175), before indulging in fishery or chase thereon, that title to the quarry shall be deemed to be in the State of New York. New York, not being under the Federal Constitution the protector of these Indians, such a statute would be merely coercive. We would acquit the

legislature of the usurpation of power implied in the construction of this statute reached by the appellate courts of New York. We omit to cite here the authorities we cited below as to whether general laws, enacted by an English-speaking people for the government of themselves should, in absence of express provisions to the contrary, be deemed to apply to tribal Indians even where wardship over Indians is conceded to exist in the same legislature. And where guardianship exists and is to be exercised to control tribes, the legislative body must act, for the subject is political, not judicial.

Lone Wolf v. *Hitchcock*, 187 U. S. 553.
Dole v. *Irish*, 2 Barb. 639.
Blacksmith v. *Fellows*, 7 N. Y. 401 (Affd., 60 U. S. 366; 19 How.).
People v. *Dibble*, 16 N. Y. 203 (Affd. 62 U. S. 366; 21 How.).
United States v. *Bellm*, 182 Fed. Rep., 161.

The provisions of the conservation law here involved are on their face adapted not to Six Nation Indians but to the situation of the citizens of New York who, as have the people of many other States, have chosen to make fishery and the chase the privilege of such of them as may afford the annual license fee and other indispensable expense when pursued as a mere sport. With the placing of such restrictions on those who are subject to New York jurisdiction and who may fish at the *locus in quo* along with the Senecas the Senecas have no concern. That statement should make it plain that we do not combat, and did

not below, the position that in general a State has jurisdiction to control the taking of fish and game and may be deemed proprietor thereof as between itself and its own citizens or alien residents; as between itself and the Federal Congress in respect to its own territory to control the taking. But the latter is purely a white man's question with which we are not here concerned. But by the same token the tribal Senecas, unless their Federal protector, the Congress, intervenes, may regulate themselves in the taking of fish and game within their tribal game reserves, whether limited or unlimited reserves. They may not regulate their white neighbors in the enjoyment of white men's reserves, limited or unlimited, for the same reason that the white man may not exercise a corresponding power. The court of appeals fell into inexplicable error when it spoke (Record, p. 15) of these Senecas as members of the same community with the people of New York, for they are not and may be never. Like error was committed by that court when it said (Record, p. 14) that the *locus in quo*, because not a *residence* reserve of the Senecas, was not within an *Indian reserve* for all purposes of fishing and hunting by the Senecas.

Broadly viewed, the destruction of wild life since 1797 has, whether Indians kill in breeding season or not, been due to the growth of white population and not to these Indians, who have been but a handful of people occupying but a fraction of the land on which wild life is found. The desire of the white man to conserve wild life is a recently acquired virtue. If

in securing a perpetual tribal right to fish and hunt on these ceded lands, the Indians of 1797 were sagacious, their descendants are justly entitled to the advantage, if it be one, when the white man's sagacity in dealing with Indians has prevailed to his particular advantage in so many other cases.

SECOND.

The Tribal Senecas, in Absence of Restrictions Imposed by Congress, Were Free to Hunt and Fish on the Morris Lands Whenever They Chose and According to Their Customs or Were Free to Impose Regulations upon Themselves.

DUALITY OF JURISDICTION.

Consistently with the nature of the case and with the decisions of this court below cited, we hold that, as a general proposition, the reserves of the Six Nation Indians are no "part" of the State of New York. For the same reason we refrain from speaking of these Six Nation Peoples as "New York Indians." For the purposes of the case at bar the Morris lands are not to be deemed ceded lands at all.

In discussing our second proposition we eliminate all that might be pertinent for us to say had Congress, in the interest of the Senecas, legislated to regulate them in these respects. We omit also what might be said had Congress assumed by affirmative act of legislation to vest in New York a power to act in place of Congress on this subject. Congress would no doubt abstain if solicited, for that duty would not open to delegation. The vesting in Congress of its power over commerce with Indians was the result of an intent to withhold that power wholly in future

from the separate States. If Indian conduct is to be regulated, the duty remains in Congress and may not be shirked by delegation of it, for it is a special trust to secure justice in the treatment of the Nation's wards and to insure peace between them and the white man.

Defendant in error here fails, then, unless he convinces this court that by the treaty of Big Tree it was the intent and understanding of the parties that a tribal Seneca, in leaving his residence reserves to fish at the *locus in quo*, would be leaving the frontiers of his tribe and be subjecting himself in fishing to the jurisdiction of New York. If that were the understanding, then his right there would be one falling, like that of a white man, under the legislative power of New York to regulate according to the will of the State legislature. If the State had that right, it is immaterial here to know whether the right fell under the head of police powers, as publicists classify governmental powers, or fell under some other heading. The Seneca in any case, then, would have no advantage over the unnaturalized Russian who possessed private lands in New York with the right to fish upon them, but who discovered, e. g., that New York had prohibited the taking of trout for a term of fifty years. Such would be "an impotent outcome" of the Big Tree treaty. U. S. *v.* Winans, 198 U. S. 371.

There are no express words in the treaty of Big Tree requiring the interpretation supposed; none which compel it or which, by any straining, may be made to mean it. If such had been the purpose of

the parties, mutually understood in 1797, it would have been expressed. The failure to express it is conclusive proof here that the intent never existed. The soundness of our position springs from the fact that no previous or subsequent cession by Six Nation Indians reserving hunting and fishing rights, and they made many, had submitted such rights to regulation of any outside power. Up to 1797 no white man's government, whether of the French, the British, the Colony or the State of New York, had ever pretended to possess such right or attempted to exercise it and all that time and long afterwards, the activities of these Indians were mainly directed to fishery and the chase. This is not to be explained away by suggesting that these Indians have not until now provoked exercise of such outside regulation for they have enjoyed this freedom and there is no recorded instance of express legislative challenge of it and no judicial challenge of it until the county court case, People *v.* Pierce (18 Misc., N. Y., 83), arose in 1896 in New York. While less dependent since 1797 on the chase, Judge Pooley, at special term, found (Record p. 4) that the Cattaraugus Senecas had fished from 1797 to date at the *locus in quo* "regardless of the laws of New York."

But there was no one at Big Tree with an interest to insert any such provision in the treaty, if the Senecas would have listened to the proposition. The title to be acquired by Morris, a basis for settling the wilderness, was vendable without such stipulation, as events proved. The representative of Massa-

chusetts present at Big Tree surely did not care for it. New York was not present, for she had previously consented at Hartford that the sales by the Senecas should be attended by Massachusetts. But at Big Tree Massachusetts was not concerned with any future interests of New York. We can not concede that the Senecas intended or would have submitted themselves to a situation under which their chief men would become liable to arrest by a neighboring white man with a petit constable's authority and to be put to trial before white men as petit jurors on charge of fishing with a spear or of shooting a deer with bow and arrow. Game was so abundant at that time that the motive of protecting wild life had not yet dawned upon the white man. Wild life was then a nuisance to agriculture and a danger to white settlements. Conditions have indeed changed and may warrant the protecting by New York of her wild life remaining within the limits of her unqualified jurisdiction, but changed conditions afford no foundation for extension of State power cutting down tribal rights and invading Federal jurisdiction.

The Kansas Indians, 5 Wallace, 737.

Neither may any supposed necessity for the preservation of wild life entertained by New York legislators justify their legislation as against these Indians within their own reserves, for that argument would serve as well to break down every barrier essential to the tribal existence of these Indians, and that may only be done by act of Congress.

The Seneca Nation of the Six Nation Confederacy was in fact the Indian tribe party to the treaty of Big Tree, however styled by the draftsman in the document. The reservation "to the sachems, chiefs, and warriors" meant the Seneca Nation. That alone would have imported perpetual duration for the reserved right, but use of the words "and their heirs" emphasized the idea of perpetuity, for the term heirs has been the chosen vehicle of the English draftsman to denote perpetuity.

At this period New York was entering into treaties on her own responsibility with other nations of this confederacy, and the language of those treaties covering reservations of fishing and hunting rights was: "The Oneidas (Onondagas and Cayugas) and their posterity forever shall enjoy the free right of hunting in every part of the said ceded land and of fishing in all the waters within the same." If the New York draftsman had been at Big Tree, the same form of expression would no doubt have been used there. Each of these tribes was seeking the same essential thing in this respect, and each had the right to believe that it had been secured. In the New York purchase of the Mile Reserve in 1802, each party, "The State of New York and the Seneca Nation," agreed (see ante) that fishing in the Niagara was to be—

> the common right of both parties, to be enjoyed without hindrance or interruption from the other.

Those parties acknowledged that pact before Chancellor Kent, who certified that they understood that

document. May New York be heard to say that she may impose prohibitions on the use of nets in the Niagara by the Senecas and not "hinder and interrupt" their enjoyment of that reserved right? No words better paraphrase the meaning of the treaty of Big Tree, on the point in issue here, than those words from the State treaty of 1802. White men to become landholders under Morris could fish at the *locus in quo* because the Senecas did not reserve an exclusive fishery and the Senecas do not dispute that right of their white brethren. The Senecas could fish there freely as against their white brethren because the right at any spot on the ceded land was to be, as between the two peoples, a common right even though not so expressed in affirmative terms. The white man's State government has no more right to dictate the instruments to be used by the Senecas in fishing than have the Seneca chiefs to so dictate to the white men, for either attempt would be a hindrance and interruption of the other not contemplated in the bond.

The appellate courts of New York each entertained the view and said (Record, p. 11:14) that the *locus in quo* was not on an Indian reservation. If they meant, in saying so, that it was not on a residence reservation, it was true. But it was open to the Senecas at Big Tree to sell or to refuse to sell, and Washington had so assured them (see ante). It was competent for them, then—their Federal protector assenting, and it assented—to sell a qualified right to Morris, and the

Senecas decided so to sell, and Morris agreed to accept a qualified cession. The Senecas ceded all interest in the ceded land except the right in themselves to fish and hunt over it with all the liberty that they had ever enjoyed. They therefore expressly "reserved" unto themselves the whole expanse for the enjoyment of that special use, but without excluding Morris from an equal enjoyment of fishery and chase. It remained a "reservation" *pro tanto*. They retained jurisdiction *pro tanto* over that land in their own tribe, to support, sustain, and regulate, if they chose, their own citizens in the enjoyment of that fishery and chase, and none the less because not so recited in affirmative terms.

For the same reason, without affirmative words, jurisdiction of New York attached to the same lands to support, maintain, and regulate all uses by Morris and his grantees not retained by the Senecas. The treaty operated neither as a property conveyance of land unqualifiedly nor as a tribal release of all territorial, tribal jurisdiction. The land itself became thereby subject to a joint property ownership and to dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be. This may very well have been difficult for the upper courts of New York, in 1915, to comprehend and so to refuse to believe. The *locus in quo*, however, in consequence of the treaty of Big Tree, remained after 1797 an Indian reservation for the special and limited purposes intended, and no

less, in legal contemplation, to the extent of those purposes, than a residence reserve upon which no white man might lawfully set foot for any purpose under warrant of mere State authority. Hunting grounds of Indians are to be regarded as in possession of the tribe.

Mitchell v. *United States*, 9 Peters 745.

This duality of jurisdiction at a spot within the frontiers of New York, as commonly delineated on atlases made by white men, is really nothing new. By the treaty of Canandaigua it is provided (see ante) that the chiefs of the Six Nations shall, where offense has been given by white men, lodge complaint with the Superintendent of Six Nation Indians. That provision still stands and New York State is bound by it. An Onondaga chief may then journey across the territory, commonly spoken of as the State of New York, *en route* to Washington to lodge his complaint. On such errand he is exempt from every species of jurisdiction possessed by New York. She could not require him, as a traveller, to carry a light at night. He would travel as fully under protection of his tribe as would the Ambassador from the Court of St. James travel under protection of Great Britain in journeying to Washington. No doubt a tribal Seneca may leave his own reserve and cross "New York land" to visit his brother of the Onondaga reserve and while crossing be equally beyond control of New York law though not so stated in terms of Six Nation treaties. This situation has led to no known

embarrassment of the government of New York, for these Indians are well-behaved men. If, then, they misbehaved the case would be one for Federal authorities to take up.

So it has been true for a century and more that a white man traveling a New York highway, so called, may be subject to every police rule of New York and a Six Nation Indian at the same spot on the same day be subject to none of them because of this duality of jurisdiction. If this be intolerable in New York to-day, it is in fact the orderly result of her act in joining the Union in 1789, whereby she put it out of her sole power to subjugate the Six Nation people.

Moreover, New York expressly consented in advance, so far as she could by the Hartford Convention, that the grantees of Massachusetts might buy Seneca lands, and, in the absence of stipulations to the contrary in that convention, and there were none, that the purchases might be of limited interests in the lands, so as to result in limited jurisdiction by New York over the ceded territory. New York there agreed, too (see "Tenthly"), that it should be Massachusetts, not herself, which should attend and supervise the sales to be made to the Senecas. If New York had desired results other than those which occurred, she should have insisted at Hartford accordingly, but she did not. New York thus abandoned all rôle of protectorship over the Senecas. If that convention is a valid pact and if either State has any right to impose rules for the taking of

fish and game on tribal Senecas, it is Massachusetts, so far as that right may spring out of a duty of State protectorship. It was because New York renounced that right at Hartford in favor of Massachusetts that New York was not represented at the Seneca cession to Phelps and Gorham, in 1788, of the Seneca lands east of the Genesee (Am. State Papers, v. 5, Ind. Affairs, V. I, p. 210), and the reason also why she was not represented at the later cessions of residence reserves or parts thereof to the Ogden Land Company.

We concede, of course, that a tribal Seneca on lands within New York's frontiers and not subject to tribal rights of the Senecas, and on his private business or pleasure, is, except as stated, subject to the normal jurisdiction of New York, as is a Russian or any citizen of New York.

If these Indians, to the extent of their rights on these "ceded" lands, are entitled to tribal protection to the measure of their need for it, then the principles laid down in the cases arising on residence reservations apply here.

Treaties between a white man's government and an Indian tribe are to be read by white men's courts favorably to the Indians or as the Indians had the right to understand them.

Worcester v. *State of Georgia*, 6 Peters 515.
Jones v. *Meehan*, 175 U. S. 1.
Northern Pacific R. R. Co. v. *United States*, 227 U. S. 855.

Federal treaties (and the treaty of Big Tree was one) are, as compared with State jurisdiction and legislation, the supreme law of the land.

The New York Indians, 5 Wall. 768.

The guaranty by the United States to the Senecas by Article IV of the Pickering Treaty of the "free use and enjoyment" of the lands then occupied by the Senecas, including the *locus in quo*, still applies to secure to the Senecas such rights therein as they have not yielded up.

It was the intent of the treaty of Big Tree that these rights, then possessed, should not pass away from the Senecas under the ceding clause.

United States v. *Winans*, 198 U. S., 371 (381).

If the Senecas were not to be immune from State control in the enjoyment of fishery and chase on these lands it must be assumed that they would have refused to cede to Morris.

Dick v. *United States*, 208 U. S. 340.

Treaty engagements with Indians saying that they may have certain rights, either exclusive or in common with white men, are to be protected.

Holden v. *Joy*, 17 Wall. 244.

United States v. *Winans*, 73 Fed. Rep., 72 (fishing case).

Re Blackbird, 109 Fed. Rep., 139 (fishing case).

Seneca Nation v. *Appleby*, 196 N. Y., 323.

In the Appleby case the court of appeals said that the Senecas could use their lands "as they see fit" and "so long as the nation exists."

The fact that Indians in selling tribal lands reserve possessory rights only temporarily, does not operate to subject them to State jurisdiction in the enjoyment of those rights before Congress shall take appropriate action putting an end to its protectorship.

Dick v. *United States*, 208 U. S., 340.

The treaty of Big Tree, having been negotiated with the United States, operated as to the reservation of the rights retained, with all the force of an act of Congress, for it was expressly ratified by the Senate and proclaimed by the President.

United States v. *Pelican*, 232 U. S. 442.

This treaty did not operate to reserve to the Senecas only a *jus privatum* in the land but to retain a tribal right in order to secure the private enjoyment of it by members of the tribe.

Re Mattson, 69 Fed. 535.
McReady v. *Virginia*, 94 U. S. 391.

The Fort Harmar treaty of 1789 with the Six Nations expressly provided for the surrender of Six Nation Indians who might commit murder or robbery, to the United States or to a State for punishment in certain cases named.

If that provision were still operative, New York would have the power to punish Indians only for the two crimes named, for other crimes were neces-

sarily excluded, and as to those two crimes the power would exist only by virtue of the express consent of the tribes. That provision, however, was omitted from the Canandaigua treaty of 1794 and was superseded by the inconsistent new clause of the latter which provided, as to crimes, only that there should be a surrender of a wrongdoer to his own people for punishment until such time as the United States should make other provision, and the United States has never since provided that any crime by tribal Indians within their own reserves should be punishable by any State in the Union.

The only control by white men to which tribal Indians may be subjected is that which may be exercised by Congress.

United States v. *Kagama*, 118 U. S. 384.
United States v. *Sandoval*, 231 U. S. 28.

The lands of native Indian tribes are no part of any State; the laws of a State are not operative upon such lands; the officers commissioned by a State may not enter upon such lands to serve process of State courts; grants by European sovereigns to their subjects of domain in America have no effect upon the right of the natives of America to the soil they possess and to their independence; it was the intent of the Federal Constitution that all shackles previously existing on Federal departments in right to exclusive control over Indian affairs should be removed.

Worcester v. *Georgia*, 6 Peters 515.

No State may tax the lands of Indian reservations, and this rule was laid down by this court in the absence of any affirmative act of Congress denying such power to States.

The New York Indians, 5 Wallace 761.
The Kansas Indians, 5 Wallace 737.

In the recent case before cited, *United States* v. *Hamilton*, arising in the western district of New York by writ of habeas corpus to inquire into the cause of detention by New York game protectors of Cattaraugus Senecas arrested for taking fish with a net within the Cattaraugus residence reserve, Judge Hazel, by opinion filed Nov. 4 ult. (not yet reported), wrote after receiving an opinion from the New York State attorney general, who had at first undertaken to defend the arrests:

> I have received from him (the attorney general) an admirable opinion based on an examination by him of the authority bearing upon the disputed question of jurisdiction, in which he reaches the conclusion that the position of the United States Government was right and that the New York State conservation law does not apply to tribal Indians within the territorial limits of the State. I adopt such opinion, which is filed herewith, and concur in the conclusions therein reached. An order may be entered allowing the writ and discharging the defendants.

Throughout the history of the relation between the people of the United States and the tribes of native Indians, the right and duty of guardianship

over them has been recognized as being in the Federal Government and not to any degree in the separate States, and of this the numerous Indian depredation acts of Congress are witness.

The above considerations and authorities all point to the absence of governmental power in the separate States over tribal Indians on tribal lands, and if this be true, power over them in a State as to the taking of fish and game fails along with any other governmental power, for there is no principle for sustaining one of those powers called the police power and not another. It would be difficult to say that the taxing power was not as important as the police power.

We assume that the case of *Ward* v. *Racehorse*, 163 U. S. 504 will be cited against us for there conviction of a tribal Bannock in the courts of Wyoming for killing of elk was sustained by this court. We would point to the distinguishing facts, in reply.

There the duration of the reserved right to hunt on ceded lands was not perpetual but "while game may be found and peace subsists" and then only at such particular places as remained "unoccupied lands of the United States." The right thus described was held by this court on evidence produced to have lapsed at the place where the elk were killed. Here the duration of the reserved right is not only unlimited in terms but is in terms perpetual because the right runs to the "heirs" of the Senecas. The Senecas, of course, believed that the right would be perpetual. There the treaty was made before Wy-

oming was admitted to the union, and on its admission no exemption of jurisdiction at the *locus in quo* was made in favor of the Bannock Indians. Here New York possessed at the conclusion of the Big Tree treaty all the jurisdiction she has to-day over this territory and subject-matter. Before that she had so far as she could by express and voluntary compact with Massachusetts agreed that Massachusetts might have as against herself "the preemption right" of Seneca lands and might transfer that right to others.

In the Bannock case Congress, by the admission of Wyoming with no reservation as to State jurisdiction, subjected the Bannocks when they wandered over into Wyoming to Wyoming jurisdiction. Here Congress, since the treaty of Big Tree, has never enacted a statute of any kind subjecting the Senecas while within their own frontiers to the power of New York. The result in Ward *v.* Racehorse was not only reached by a divided court, but its authority, if adverse, has been greatly impaired since by the result reached in the later case of—

United States v. *Pelican*, 232 U. S. 451.

In that case this court was unanimous in saying that, as to crimes, Congress has the power to retain exclusive jurisdiction over Indian lands as against a State even after those lands have been allotted to individual Indians and the Indians themselves become citizens of the United States. It follows that if Congress may, in case of allotted lands and the dissolution of tribes by affirmative legislation, retain

exclusive control over persons of Indian blood, so, in the absence of affirmative legislation putting Indians still tribal under State jurisdiction, they retain their status as tribal Indians and their tribal rights as against State control.

United States v. *Winans*, 198 U. S. 371.

This case over-rides *Ward* v. *Racehorse*. It was decided 10 years later and on facts in principle identical with the facts here. That the rights of the Indians there were disputed by private landowners, while here they are disputed by high state officers, solicitous for state jurisdiction, is not a difference. There the federal government in discharge of its protective obligations brought suit to protect the Indian right. The defendants pleaded rights superior to the Indians in that the State of Washington had issued exclusive licenses to the defendants to fish and hunt at the *locus in quo*, the Columbia River. The treaty in that case was made in 1859, before Washington was admitted, and it gave the Indians the right to fish and hunt on lands thereby ceded to the United States "at all usual and accustomed places in common with the people of the territory." The suit was prosecuted by the Department of Justice to enjoin the defendants from preventing the Yakima Indians from enjoying these reserved rights. The trial court had dismissed the bill. This court reversed the decree, and held:

> The position that these Indians acquired no rights but what any inhabitant of the territory or state would have; only such rights

as they would have had without the treaty, is certainly an impotent outcome to negotiations and a convention, * * *. We will construe a treaty with Indians as that unlettered people understood it and as reason and justice demand.

The treaty was not a grant of rights to the Indians, but a reservation of those not granted.

They impose a servitude upon every piece of that land. * * * Citizens might share the fishing, but the Indians were secured in enjoyment of their rights.

The Indians were given a right in the land, the right of crossing it to the river, the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. The right was to be continuing against the United States and its grantees as well as against the State and its grantees.

It makes no difference that patents conveying this land are absolute in form. They are subject to the treaty as they are to other laws of the land.

It was competent for the nation (U. S.) to secure to these Indians such remnant of the great rights they possessed as taking fish at all usual and accustomed places. Nor does it restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.

The opinion of the court of appeals in the cause at bar manifestly misinterpreted (Record, p. 15) the

opinion of this court in the Winans case. That court read the opinion of this court to mean that the right secured by the Yakimas to take fish at all usual and accustomed places was not restrained unreasonably if at all in regulation thereof by the State of Washington. We do not understand that the opinion of this court should be so read, but instead should be read to say that due protection of the rights of the Yakima Indians, as intended by this court, was not inconsistent with the exercise by the State of Washington of a reasonable regulation over the citizens of Washington in fishing at the same places. This court said that the right of the Yakimas "was intended to be continuing against the United States and its grantees as well as against the State and its grantees," and this court expressed its dissent from the contention that the rights of the Yakimas "were such as they would have without the treaty." That meant that rights of the Yakimas were beyond the reach of the State of Washington.

The better authorities in the New York courts uphold our contention.

Bishop v. *Barton*, 2 Hun 436; affirmed, 64 N. Y. 637.

In that case the old general term of the Supreme Court of New York held that the general statute making it the duty of highway officers to keep highways in order did not apply to highways upon Indian reservations.

People ex rel. Cusick v. *Daily*, 212 N. Y. 183.

There the New York Court of Appeals recently treated as ineffective the early attempts of the New York Legislature by declaratory statutes (Laws of N. Y., 1822, chap. 204, since repealed) to acquire State jurisdiction to try tribal Indians for murder in face of tribal protests of the Senecas. The legislature avoided an issue over the matter in 1822 by declaring in the same act that they "pardoned" Tommy Jenny, the offender in question, for what he had done.

Hastings v. *Farmer*, 4 N. Y. 293.

There the court of appeals upheld the legislature in its affirmative prohibition of suits against tribal Indians in State courts.

Jackson v. *Hudson*, 2 Johnson 374.

In that case Chancellor Kent declared of the Mohawks that they never were amenable to State courts of justice and had been recognized as possessing an independent tribal existence since long before the Revolution.

B. R. & P. R. R. Co. v. *Lavery*, 75 Hun 396.

There the supreme court held that it was not within the jurisdiction of a State to vest an Indian tribe with power to grant its tribal lands to white men.

The better authorities of other States concur with the above cases.

State v. *Campbell*, 53 Minn., 354 (55 M. W. 553).

There the Minnesota court held that the State courts could not punish a tribal Indian for an act of adultery prohibited by State statutes, saying that the State courts below had attempted to arrogate a jurisdiction vested as to white men only in their Federal Government.

In re Black Bird, 109 Fed. 139.

There a tribal Indian had been convicted in the State courts of Wisconsin for fishing with a net. In ordering his discharge on habeas corpus, on application of the Federal district attorney, the Federal court said:

> It is adding insult to injustice now to deprive these Indians of the poor privilege of exercising their rights to net suckers in a little stream on their own reservation.

The judge was convinced that the State legislature had not meant to legislate over reservation Indians, and said so.

> *United States ex rel. Davis* v. *Shanks*, 15 Minn. (Gilfillan) 302.

There, on writ of prohibition to a probate judge, the higher State court held that the estate of a deceased reservation Indian was not subject to the jurisdiction of State courts to administer.

> *Earl* v. *Wilson* (Minn.), 7 L. R. A. 125.
> *Kobogum* v. *Jackson Co.*, 76 Mich. 498.
> *La Riviere* v. *Do* (Mo.), 105 Western 840.

These cases hold that there is no State power to legislate for regulation of the marriage relation among tribal Indians.

There are, of course, State cases to the contrary of our position, and we will set them forth.

People v. *Pierce*, 18 Misc. (N. Y.) 83.

That case arose in 1896 and involved a charge of taking fish on the Allegany residence reserve of the Senecas, and the conviction was upheld by the county judge, who considered that the authority of the New York sprang from the Hartford convention.

State v. *Norwell*, 84 Maine 466.

In that case Maine game laws were enforced against tribal Indians, and if the few remaining indians in that quarter acquiesce in State jurisdiction over them, we assume that it is because they have been too few and weak to carry the question into Federal courts and so few as to be lost to their Federal protectorate.

Other adverse holdings in the courts of New York are submitted in a desire to make our history of this question complete.

Hatch v. *Luckman*, 155 A. D. 765.

The appellate division there declared that State sovereignty attached to every foot of the soil of the Tonawanda Reservation belonging to a separate band of the Senecas.

Seneca Nation v. *Christie*, 162 U. S. 280.

This court there affirmed a dismissal on the unanswerable ground of the statute of limitations. The Court of Appeals reviewed State treaties with Six Nation Indians concluded in the absence of Federal con-

sent, and interpreted the vitality out of the Indian article of the Federal Constitution and out of the Federal Indian intercourse act. We offer no argument here against the position of the Court of Appeals of New York in that case, that Congress could, and in certain cases undoubtedly did, waive the invalidity of many New York treaties, especially where Indians had agreed to land sales, had accepted the money of the parties with whom they dealt, and had vacated the lands. In the Christie case, however, neither that court nor this was cited to the debates in the Federal convention on the Indian article.

An exception to the rule for which we contend may seem to arise in case of the several villages made up of white people situate on the Allegany reserve of the Senecas over which New York extended her jurisdiction in 1881 (chap. 188), but this was only after that step had been authorized by act of Congress (act of Feb. 19, 1875; Fed. Stats. Annot., v. 3, p. 518). The purpose of this legislation was not to vest New York with control over tribal Indians but to insure control over white people who, under cover of Indian leases to them, had originally squatted upon that residence reservation.

If we are wrong in our main position, then it follows that New York has jurisdiction over the conduct and life of these Indians in every respect and they will exist as tribes only in theory, for the courts of New York will not refrain in the future, since they have not refrained in the past, from exercising func-

tions vital to the existence of self-government—ancient, tribal, or constitutional—in any measure by Indians. We cite the following additional cases from New York, indicating the extent to which the courts of New York have taken unto themselves the conduct of affairs of tribal Indians, and especially of the Senecas:

Denying right to enjoy their own intestate laws (*Matter of Printup*, 121 A. D. 322); to settle their own disputes over tribal offices (*People ex rel Jameson* v. *Johns*, 80 Misc. 418); to settle their own disputes over tribal lands (*Peters* v. *Tall Chief*, 121 A. D. 309; *Silverheels* v. *Maybee*, 82 Misc. 48; *Jimeson* v. *Pierce*, 78 A. D. 9); to enjoy tribal lands as against ouster through the action of the State judiciary (*Boylan* v. *George*, 133 A. D. 514; *Hatch* v. *Luckman*, 155 A. D. 765); to enjoy immunity from the penalties imposed by white men for what white men deem misconduct (*Bates* v. *Printup*, 31 Misc. 17). Nearly all of these cases arose in the fourth judicial department through which this case comes to this court. It is there where all the Senecas live.

If this State jurisdiction exists, then at any time all tribal government may have to stand suspended while all the governing officials obey subpœnas of some nearby justice of the peace who is inquiring as to what is going on upon the reservation.

The Federal authorities have recently brought suit to reinstate the Indians who were ousted by the State courts in the case of *Boylan* v. *George*, *supra*. It would seem on its face inexplicable that the in-

vasion of tribal rights involved in the above cases could have accumulated. The explanation may be found. In many instances these Indians have asked the State courts to pass upon the question submitted. Almost always in such cases the Indians, defeated in the first instance, have had no means of their own adequate to appeal. They have commonly neglected to ask the Department of Justice to sue or defend for them. The right, power, and duty of the Federal departments to protect Indian rights is thoroughly established in the following decisions of this court:

United States v. *Rickert*, 188 U. S. 432.
United States v. *Heckman*, 224 U. S. 413.
United States v. *Boyd*, 68 Fed. 577.
United States v. *Winans*, 73 Fed. 72.
United States v. *Gray*, 201 Fed. 291.
United States v. *Mackey*, 216 Fed. 126.

In the Heckman case this court said, too, that the judiciary would be moved to do its part to enforce respect for Indian rights and would adapt its procedure to the necessities of the case presented.

THIRD.

The Rule as to the Field Open to State Jurisdiction in Matters of Interstate Commerce Does not Apply as to Commerce with Indian Tribes.

Time has brought to the surface a variety of arguments to sustain the pretensions of New York to jurisdiction to control Six Nation Indians despite the Federal Constitution and treaties with these Indians. One of these was the argument advanced in the courts for the first time and by the New York attorney general when the cause at bar was before the appellate courts

of New York. It was that since Congress had never undertaken to regulate these Indians in respect to fishery or the chase on their reserves, an admitted fact, that right existed unimpaired in the legislature of New York. The contention was based on the ground that the principles underlying the rules applicable as between Federal and State jurisdictions in case of interstate commerce applied. The courts below, whether they approved or not, did not express themselves on this matter. That contention has since been honored, however, in the late convention in New York, which proposed a new constitution for that State. The committee of that convention on relations with the Indians, in reporting a plank reciting that all general laws of the State should apply to Indians, when not in conflict with affirmative laws of Congress, submitted a report on July 29, 1915, containing the following:

> Your committee is convinced that there is nothing to prevent legislation on the part of the State in practically every instance where the Federal Government has not assumed to legislate * * *. The United States Supreme Court seems to have settled the respective powers * * * of a State to act in the absence of Federal legislation, in the Minnesota rate cases, 230 U. S. 352.

That report was upheld, for that plank was incorporated in the constitution proposed to the electors (Art. I, sec. 15), although that constitution met, as stated, defeat at the hands of the voters in November last.

The argument so put forth was unsound. It was based on a case which had to do only with the concerns of a foreign-born population or their descendants, commonly spoken of in this connection as white men, and involved only matters of traffic between those people and question as to the dispersion of governmental power as between States founded by them and a union of the same States for special purposes of their own self-government. Those people are citizens or subjects in certain respects of a separate State and in certain other respects of the union of those States. The Minnesota rate case did not pretend to consider the subject of commerce between those people and Indian tribes. Mr. Justice Hughes there said (p. 309) that as to those subjects of commerce which require uniformity of regulation, if regulated at all, they should be regulated by a single authority, and in that case the power possessed by Congress is exclusive. Of the new power given to Congress over white men's commerce he said (p. 398) that it grew out of the disastrous experiences under the old articles of confederation. That experience was that the States had acted in discord and commerce suffered. So each State had sought to control near-by Indian tribes and the Indians suffered. Tribal Indians are neither citizens nor subjects of one of these separate States nor of the union of those States. Indians are, as to white men, wards, and however arbitrarily tribal Indians may be treated by them the power, whether it exists in State or Federal union, to control Indians

is one springing from that protectorship. Here arises a special distinction under the Federal Constitution between the control of commerce between white men and Indian tribes and commerce between the white men of two separate States. The Federal power in either case may originally have been one arising by grant from separate States previously enjoying a protectorate over Indian tribes. If so, the fact does not control in the interpretation of the extent of the grant to the Federal Government. In matter of commerce between States, to leave the State free to act until the Federal power acts affirmatively on a particular phase of that commerce results in the keeping of the matter and all consequences still within the concern of white citizenship so called. When, however, the interests of other peoples, foreign or dependent, may be involved, other considerations bearing on the interpretation of the Federal compact arise. If the Federal Congress fails to act in such a matter where it should, an assumption we indulge here only for purposes of argument, danger to the white man's Government can not arise if a State is forbidden to act, for those who might suffer, being citizens, are bound to acquiesce peacefully in the operation, however inadequate, of their own governmental machinery. If the same principle be not applied in matters of commerce with Indians, great injustice to Indians, not citizens, may arise from unjust action by States neighbors to these tribes, and great disorder among both peoples and, in early

days, precisely that situation did arise, provoked by legislation of the State of Georgia. (See cases below.)

There are to-day tribal Indians *inside* some forty States and they number upwards of 300,000 souls. If this principle applied as to affairs of these wards of the Nation, then each of these forty States may proceed to coerce the tribal Indians unhappily within their respective map borders not only as to fishery but everything else. Congress, to keep in the lead of all these States in legislating on all possible subjects in this respect, would surely fail.

If the New York argument is good, it should apply equally in case of commerce with foreign nations, for Federal jurisdiction over that subject is covered by the same article and the same language. It never was pretended that because the Federal Government had neglected to conclude a commercial treaty, let us say, with Mexico, when perhaps she should, it would be open to the State of Texas to negotiate a commercial treaty with that foreign State. No state of affairs now exists to constrain this court to modify its early construction of the Indian commerce clause of the Constitution. New York is not liable to rebel or secede if the old interpretation stands. Acquiescence on the part of Indian tribes in the pretenses of the separate States of a right to deal with the affairs of tribal Indians coupled with the failure of Federal departments to prosecute the officials of such States who have violated the Federal Indian Intercourse Act, can not justify a construction of the Federal compact

now which operates to amend the compact of 1789. This court, when the people of the day were alive to the purposes entertained by the Constitution makers of 1789, construed this article and said in 1831 that the Federal power conferred as to Indian affairs was "the whole power of managing Indian affairs."

Cherokee Nation v. *Georgia*, 5 Peters 1 (18).

This court said in 1832 that this power in the Federal Government "was committed exclusively to the Government of the Union."

Worcester v. *State of Georgia*, 6 Peters 515 (561).

And in 1886 this court said that it had never (since 1789) existed anywhere outside the Federal Government.

United States v. *Kagama*, 118 U. S. 384.

There can be no divided authority over Indians—

Kansas Indians, 5 Wall., 755.

Either as to Indian property or Indian rights.

Re Heff, 197 U. S., 506.

We assume that this new contention of New York will be urged here. It should receive the attention of this court and litigation over it hereafter in inferior courts, and disturbance of Six Nation Indians thereby prevented.

Many States to-day have r ap boundaries within which the normal jurisdiction of the State is coextensive with those bounds. It seems to be the New York idea that to deny her a jurisdiction over Seneca reserves is to deny her equal rights with those States.

If, after dealing with Massachusetts, New York found herself without immediate territorial sovereignty coextensive with the Seneca lands, she can not justly complain. If this court holds that New York has no present right of sovereignty over these lands, it will not be depriving New York of those equal rights to which all States are entitled under the Federal compact. If New York may not to-day coerce the Senecas inside the Seneca frontiers, it is not because she is the victim of any discrimination.

United States v. *Sandoval*, 231 U. S. 28.

When this court protects the tribal rights of Seneca Indians not yet extinguished by the Federal political departments, or enforces jurisdiction of Congress over Indian affairs, it enforces rights which every State has an equal right and interest to have enforced. Every other State with territory surrounding an Indian reserve, or with atlas boundaries which ignore those reserves, would be dealt with in such a case precisely as the courts should deal and as this court has dealt with New York. If the native Indians have removed from territory falling within the map boundaries of all other Eastern States to the advantage of those States, the good luck is that of those States, but the fact would not point to discrimination against New York. New York should be given no compensating advantage at the expense of the occupant Senecas by denying the Senecas their tribal rights and holding that they are alien subjects of New York. No State knew better than

did New York the meaning of the new Federal Constitution in respect to Indian protection, and that she in particular was a State intended to be curbed in future exercise of authority over Indian tribes. The position she then yielded can only be recovered now as between herself and the Union by amendment of the Federal compact. In the enforcement of that compact as it stands, to which courts State and Federal are alike bound, the courts will be accomplishing what each State, New York included, expected in 1789, in order that the safety of all might be insured through just treatment of Indian tribes, who then possessed a strength which inspired among white men fear for the consequences of injustices practiced on Indians. If a decision is made to-day on this subject which our courts would not have made 100 years ago, when these Indians were powerful, our courts would not, in the language of this court, be administering "that superior justice in respect to Indians which becomes our judiciary."

United States v. *Rickert*, 188 U. S. 432.
See also *United States* v. *Dick*, 208 U. S. 356.

FOURTH.

The Hartford Convention Should not be Honored in this Cause by this Court for any Purpose Prejudicial to the Senecas.

As we have shown, New York and Massachusetts sought confirmation of the convention by Congress but failed in the effort. If not ratified the convention remained a void pact as to the Federal Government for two reasons, first, as a convention between States on any subject, and, second, as a State measure

affecting relations with Indian tribes. The two States had at first planned to respect the articles of confederation and had procured appointment of an arbitration court thereunder (see journals cited supra) but at last concluded to refrain from submitting the matter to such tribunal so that the disrespect of Federal authority over interstate compacts was deliberate. We are permitted to conclude that both States doubted if the purposes they entertained would meet with the approval of such tribunal. We do know that the subsequent refusal of Congress itself to ratify the convention afterwards concluded was because of the conviction of the representatives of other States that the Federal Government could be no party to the illegitimate purposes, so ill-concealed in the terms of that convention and of which the Senecas were the intended victims. There would have been nothing wrong in an agreement between these two States that Massachusetts should thereafter, if a single State could have that power, be the protector of the Senecas in place of New York; also that any of these lands to be surrendered by the Senecas should, when surrendered and to the extent of the surrender territorially or for partial enjoyment by white men, fall to the jurisdiction of New York. If, being such protector, Massachusetts should thereafter purchase the Seneca lands at fair value, induced by absence of adequate private bids, her right to buy would be unquestionable; or, if she wanted the lands for a State purpose, such as soldiers' bounties, and paid fair value, her right would be unquestionable. It

was perhaps harmless to call that a preemption right, though ill-fitting the case. But her purposes went further; she sought Seneca lands at less than their fair value. That was inconsistent with the duties of protectorship. She was willing, moreover, to bestow that opportunity upon private individuals ready to give her an immediate money consideration for so doing, as her convention evidenced. She could not transfer to individuals the duty of protectorship for that duty appertained to the Government which white men had founded here. It could not be transferred to private individuals since it was the essence of that duty to protect Indian tribes from becoming the victims of deals with private interests. The Hartford Convention therefore concealed these illegitimate purposes as well as possible by providing that Massachusetts, after transfer of her preemption right to individuals, should be present at Seneca sales as ostensible protector of the Senecas to insure adequate prices (see "Tenthly" of the Convention).

The presence of her representatives at Big Tree had to be a matter of form in protecting the Senecas, for she could not serve two masters; protect the Senecas and keep faith at the same time with the speculators from whom she had gotten a million dollars upon the understanding that the speculators were to be permitted by her to buy Seneca lands at such price as would enable them to recoup the million dollars. She thus decided to keep faith with the speculators and she did by approving a sale to Morris

at two and one-half cents per acre. Yet New York two years before had paid the Cayugas fifty cents an acre for their lands nearby and had already sold them off at two dollars an acre, realizing a profit of nearly a quarter of a million. (*See Peo. ex rel. Cayuga Nation* v. *Commissioners, &c.*, 207 N. Y. 42.) Had she compelled Morris to pay a price by which he would lose his million dollars Massachusetts would have played him false. He stood confessing that the land secured was worth what he had paid Massachusetts and was to pay the Senecas, for he must, in selling, recoup both sums and more or reap no profit. The Senecas out of the value of their land furnished in the end the moneys which Massachusetts received in the beginning to replenish the empty treasury she faced at the close of the Revolution. Of course an exclusive right to buy, called a preemption right or otherwise, has no value in the market unless it is intended to carry the unusual advantage of buying the subject matter at less than market value. These speculators and the present-day assignees of the preemption right as to the unceded lands of the Senecas have sought to ease their position by offering the sophistry that Indian tribes, since the advent of white men, are not to be regarded as holders of what the white man calls a fee, but that the fee is in the white man's government without cession of it; that Massachusetts held and conveyed a fee to them and that the Senecas have a mere possessory right that does not cover the value of the fee and so that value should not be paid to the Senecas.

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New York, on her part, because of the Hartford convention, did not attend the treaty of Big Tree nor the treaty of Buffalo Creek, at which Phelps and Gorham purchased the Seneca land east of the Genesee. She had consented in advance to all that resulted and was left without right on her part to protest at any iniquity worked upon the Senecas. The Federal Government did in truth attend those sales and ratified them, but it was under a constraint so to do, for it feared in those critical days of the young Federal Union to offend such powerful members of it as were Massachusetts and New York.

This court, it is true, has had this question before it but abstractly, as a result of other speculations of Massachusetts capitalists a little later in the lands of the Cherokees under grants made by Georgia when the Cherokees were still in possession. The courts at that time had not been heard from on the question whether traffic, in the possibility that Indians might some day sell and that particular individuals would be accorded the right to buy for less than the value of the land, would be lawful. The speculators in Cherokee lands therefore arranged between themselves a friendly litigation in the Massachusetts courts which finally came here.

Fletcher v. *Peck*, 6 Cranch 87.

This court there held that a State might sell its preemption right recognizing that an interest, while Indians were in possession, might exist by way of possibility and be assignable, but declared that such

assignment would affect in no way the right of the occupant Indians. In so doing this court did not and we think could not explain how the occupant Indians could thereafter be protected in making sales when, as in the Seneca case, the sovereign vendor of that right was to act afterward in the rôle of the protecting government.

The Cherokees were not before this court in that case nor was the Federal Government represented in it. No party was here with an interest to suggest the disastrous effect upon the wards of the white man's government bound to follow that decision and to be repeated as to still other lands, if the courts should forever acquiesce in the academic decision sought in that case and made in it. The question was academic in respect to the Cherokees, for they had not sold. The decision did not bind them nor the Federal Government, for it was between third parties.

Lone Wolf v. *Hitchcock*, 187 U. S. 565.

The decision in *Fletcher* v. *Peck* should not bind this court when that question comes here in justiciable form. The question is not justiciable when the real party in interest is out of court and has not sold nor tried to sell. This court was not unanimous in the case. Justice Johnson, who dissented, saw that the litigation was not genuine. The case was the first in which tribal rights were discussed before this court. The holding that Georgia held the fee of Cherokee lands yields to the later holding in *Holden* v. *Joy*, 17 Wall., 244, that the title of the Cherokees was absolute.

The Court of Appeals of New York said of this academic question, in *Seneca Nation* v. *Appleby*, 196 N. Y., 323, where the Senecas themselves sought recently the opinions of the judges of that court upon it:

> It is unwise to determine questions which may not arise until the remote future and be affected by conditions now unforseen.

The Seneca Nation may never sell their remaining lands and rights, but may dissolve the tribe, and, with Federal consent, after division among themselves of their lands, sell individually under the rights of citizens of the United States. Any preemption right now recognized as existing by way of beneficial interests in those lands would then be defeated, for that right only related to sales to be made by dependent tribes under wardship and must be confined to the limits of its origin. Public justice will not permit that it be kept alive to assure to private speculators a gratuity out of the value of lands held either by Indian tribes or by Federal citizens of Indian lineage.

The possibility that the Senecas would ever be willing to sell was much more real at Hartford in 1786 than it has been since, for then the white people of the original States were planning with formidable prospects of success to compel the eastern Indians to give up all their lands and move west. While the Senecas soon after sold the greater portion of their lands they, unlike many other east-

ern tribes, refused to give up all and have ever since flatly refused to sell all and move. It is gratuitous to indulge to-day the assumption that the nation will ever sell or die off to the last soul.

It is still common for New York officials to contend, and the State attorney general argued below herein, that the Hartford Convention vested in New York immediate jurisdiction over these reserved lands. The Court of Appeals refrained in this case, even as to residence reservations, from overruling that contention. Unless this court once for all refuses to accept that view a similar effort will be put forth to the despair of the Senecas whenever lower courts are confronted with an effort by Senecas to protect Seneca rights. The case of *Jemison* v. *Bell Tel. Co.*, 186 N. Y. 493, should not be permitted to stand as expressive of the true effect of the Hartford Convention. The later case of *People ex rel. Cusick* v. *Daily* (212 N. Y. 183) refused to follow the opinion in that case, but the refusal was not put strongly. In early days the New York State judiciary did not hesitate to deal firmly with this matter.

Ogden v. *Lee* (6 Hill, 546).

In 1844, the State Supreme Court, referring to the Cattaraugus Reservation, was there unanimous in holding that the Hartford Convention was effectual only to vest *thereafter* when the rights of the Senecas therein might be extinguished, in Massachusetts (or in her grantees) any right in the Seneca lands. That court said that the words "all other rights of

New York" in the grant to Massachusetts could not carry what New York did not have to grant, viz, a present property in the land.

So Massachusetts could not convey in 1786 to New York a present jurisdiction over Seneca lands for she herself did not possess it. The New York Court of Errors, in affirming that decision (5 Denio, 628) held that the property title still possessed by the Senecas in the Cattaraugus Reservation occupied by them possessed all the nature of an absolute fee.

This court has consistently held that the Hartford convention bestowed no present jurisdiction in New York over these lands.

> The *New York Indians*, 72 U. S. (5 Wall.) 769 (reversing 23 N. Y. 420).
>
> *Blacksmith* v. *Fellows*, 60 U. S. (19 How.) 366 (affirming 7 N. Y. 401).
>
> *Holden* v. *Joy*, 17 Wall. 244. (Cherokee lands.)
>
> *People* v. *Dibble*, 62 U. S. (21 How.) 366 (affirming 16 N. Y. 203).

New York State cases also coincide. (*Seneca Nation* v. *Appleby*, 196 N. Y. 323; *Ryan* v. *Knorr*, 19 Hun. 540.)

There are of course New York State cases which do not coincide—e. g., *Wadsworth* v. *Buffalo Hyd. Assn.*, 15 Barb. 83; *Shongo* v. *Miller*, 45 A. D. 346 (affirmed 169 N. Y. 586).

Both States, then, in 1786 were conscious of the rights of the occupant Senecas to hold their lands as

tribes, i. e., to control while in possession their own domestic and internal affairs. Neither State warranted anything to the other, but merely quitclaimed what they "had," which might be something or nothing. It was only such possible future governmental rights to accrue to New York if the Senecas removed or became United States citizens, and if the United States did not buy for themselves, that she could reserve to herself, and these rights have never yet accrued, for the Senecas are still in possession, as a tribe, of their holdings. It was these bitter experiences of the Senecas with these two States in land sales that convinced the majority of the States in 1789 that to leave protection of tribal Indians in any respect to the individual States neighboring with and most likely to be unjust to Indians might mean war with powerful tribes and breed trouble for the Union.

The cause of public justice will be served if this court shall refuse here in positive terms to uphold the proposition that the Hartford convention could vest New York with any right of control over the conduct of tribal Senecas within the frontiers of their residence lands or of other lands subject to treaty-reserved tribal rights. That State, by its attorney general, invites decision thereon in putting forward the Hartford convention as the source of the right of New York to control these people in the taking of fish and game, and Senecas are here to join in a genuine issue on the point.

THE RELATOR.

Relator, in seeking protection of tribal Indians as against trespassing State officers, is here in a public interest of both Indians and white men. The end of good government requires that relators be welcomed who would move courts to stay citizens, especially officers subject to judicial control (and the sheriff was so subject), from wrong-doing or excess of official powers when their acts would violate rights existing under public treaties, which constitute a supreme law of the land, by which all States are bound.

Strong v. *Waterman*, 11 Paige (N. Y.) 607.

FINALLY.

The final judgment and order of the Supreme Court of New York directing that the prisoners be remanded, as directed by the court of appeals, should be reversed, and discharge of the prisoners from the custody of defendant in error or other officials of New York directed, with costs.

Respectfully submitted.

GEORGE P. DECKER,
Attorney for Plaintiff in Error.

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FILED
MAR 28 1916

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 566

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*
WALTER S. KENNEDY, PLAINTIFF IN ERROR,

vs.

FREDERICK W. BECKER, AS SHERIFF OF ERIE COUNTY, NEW YORK, DEFENDANT IN ERROR.

Brief For Defendant In Error

HERBERT B. LEE,
Assistant District Attorney, Buffalo, New York.

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No. 666

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* WALTER S. KENNEDY, PLAINTIFF IN ERROR,

against

FREDERICK W. BECKER, AS SHERIFF OF ERIE COUNTY, NEW YORK, DEFENDANT IN ERROR.

BRIEF OF DISTRICT ATTORNEY IN BEHALF OF DEFENDANT IN ERROR.

STATEMENT.

The cause comes to this court by writ of error, dated the 5th day of October, 1915, allowed at the instance of relator, to review an order made herein by the Court of Appeals of the State of New York (215 N. Y. 42). The said order affirmed a final order of the Appellate Division of the Supreme Court, Fourth Department, entered on the 6th day of January, 1915, which reversed an order of the Special Term of Erie County, Hon. Charles A. Pooley, Justice Presiding, entered on the 2nd day of June, 1914, discharging from the custody of the sheriff of Erie County Fayette Kennedy, Warren Kennedy and Willis White, Jr., three Indians, who were brought before the Special Term on a writ of Habeas Corpus.

FACTS.

The three Indians before named, members of the Seneca Nation and residing upon the Cattaraugus Reservation, were taken into custody charged with violating Sec. 176 of the Conservation Law of the State of New York, in that on the 31st day of May, 1914, they had speared fish in Eighteen Mile Creek, in the Town of Evans, County of Erie, State of New York, and had had in their possession two small-

mouthed black bass, two bullheads, one catfish, two carp, and nine suckers and mullet. They were arraigned May 31, 1914, before Frank D. Booth, a Justice of the Peace of the Town of Tonawanda, in said county and state, were granted an adjournment in order that they might procure counsel and bail, and in default of the latter were committed to the Erie County jail (transcript of record, pages 2-8).

The alleged offense and the arrest took place at a point without the limits of the Cattaraugus Reservation (id. page 14).

A writ of Habeas Corpus was allowed on the 1st day of June, 1914 (id. page 6), and upon the return before the Special Term, it appeared that in 1797, by the so-called Treaty of Big Tree, the Seneca Nation had conveyed lands, including the situs of the arrest and the alleged offense, to Robert Morris, "excepting and reserving to them, the said party of the first part [the Seneca Nation], and their heirs, the privilege to fish and hunt on the said tract of land intended to be conveyed" (id. page 14). The court took the view that the words quoted gave to the Senecas the right to fish and hunt upon the lands conveyed "at will, and at all seasons of the year, regardless of the provisions of the game laws of the State of New York," and ordered the discharge of the prisoners (id. page 4). The Appellate Division of the Supreme Court, Fourth Department, and the Court of Appeals of the State of New York took the opposite view, and ordered them remanded to the custody of the sheriff (id. pages 11 and 15).

This court is asked to determine whether the aforesaid reservation clause prevents Sec. 176 of the New York State Conservation Law from being applicable to these three Indians, arrested under the circumstances above related.

HISTORICAL.

In 1628-1629, Charles I of England granted to the Colony of Massachusetts Bay a strip of land extending, by the terms of the grant, "from the Atlantic and westerne sea and ocean on the east parte, to the south sea on the west parte." About forty years later, Charles II of England granted to his brother, the Duke of York, afterwards James II, certain other lands of "Newe Englande." The grants overlapped, and each purported to convey land now comprising the western part of the State of New York.

During those troublous times after the Revolution and before the adoption of the present Federal Constitution,

times so appropriately called by John Fiske the "Critical Period," the rival claims of the States with reference to territory were not the least important factors making for disunion. Among those rival claims was that made by both Massachusetts and New York to what is now Western New York. This territory included the *locus in quo* involved herein.

The dispute between the states named was settled at the so-called Hartford Convention, held at Hartford, Connecticut, in 1786. There it was stipulated as to the territory in dispute that Massachusetts should have "the right of preemption of the soil from the native Indians, and all their [New York's] estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted)," and that New York should have "the government, sovereignty and jurisdiction." Thus at least one of the rival land claims was compromised and settled.

A year later the Constitutional Convention met and drew up the Federal Constitution, which was adopted by New York and nearly all the other original thirteen States in 1789.

The adoption of the Federal Constitution made it apparent that our separation from Great Britain had resulted in the creation of a real political unity. The source of interstate quarrels over land disappeared, and the quarrels ceased. President Washington put down the so-called Whiskey Rebellion and thus demonstrated to Americans everywhere that the new government was capable of maintaining its supremacy in the sphere wherein the Constitution had made it supreme. The sound financial measures of Secretary Hamilton restored the national credit at home and abroad. As a result of the Jay treaty, Great Britain at last evacuated the western posts. Men did not yet dream that within one century the United States of America would comprise a solid block of territory extending from the Atlantic to the Pacific, from the Great Lakes and the 49th parallel to the Rio Grande and the Gulf of Mexico. But they were aware that the new state would expand and grow; indeed, even before the close of the Revolution, the movement westward was very marked. The new Constitution and the governmental measures following close upon its adoption aroused a feeling of confidence that enabled the country really to begin a development the rapidity of which was unprecedented in history.

Among the first to perceive the changed condition of affairs and the consequent opportunities for making money

was Robert Morris, the astute financier of the Revolution. It was obvious to him that the expansion westward would increase land values. He saw that Western New York must soon be inhabited by a thrifty people, and that, if he could acquire title to a large tract of land in that section, he could re-sell at a profit.

Mr. Morris proceeded to acquire what he considered a valid title to the tract he desired. As a result of the Hartford Convention, entered into, as we have seen, before the adoption of the Federal Constitution, Massachusetts had "the right of pre-emption of the soil from the native Indians." The first step was to acquire this right from Massachusetts, which was done by purchase. The next step was to buy from the Indians whatever rights they had. This step could not be taken, however, without the approval of the Federal Government, which even at this early time had assumed a degree of guardianship over the Indians. Therefore, when, at Big Tree, in the Genesee Valley, Morris made his purchase from the Senecas, a representative of a government grateful for Revolutionary services of the highest value participated in the deed of conveyance, not primarily for the purpose of committing the United States to a pact with the Indians by the terms of which the United States would receive some direct benefit, but for the purpose of stamping the transaction between Morris and the Indians with the Government's approval, as required by the Indian Intercourse Act, thereby assuring to Morris a clear title to the land purchased. Thus the project was consummated.

Seneca Nation vs. Christie, 162 U. S. 283.
People vs. Pierce, 18 Misc. (N. Y.) 83.
Fiske's "Critical Period."
Elson's "History of the United States."

OUTLINE OF ARGUMENT.

INTRODUCTION.

I. The question in the case at bar is whether the treaty of Big Tree reserved to the Senecas a right not subject to regulation by the Game Laws of New York.

DISCUSSION.

I. THE SO-CALLED TREATY OF BIG TREE WAS MERELY AN ORDINARY CONVEYANCE BY DEED.
   - A. The grantee was a private individual.
   - B. The subject matter of the grant was merely an interest in real property.
   - C. The form of the so-called treaty was that of a common deed.

II. IF THE TREATY OF BIG TREE WAS AN ORDINARY CONVEYANCE BY DEED, THE EXERCISE OF THE PRIVILEGE RESERVED WAS SUBJECT TO THE POLICE POWER OF THE STATE OF NEW YORK.

III. WHETHER THE TREATY OF BIG TREE WAS A TREATY IN THE PROPER SENSE OF THAT TERM, OR AN ORDINARY CONVEYANCE BY DEED, IT DOES NOT PURPORT TO GIVE THE EXEMPTION CONTENDED FOR BY THE PLAINTIFF IN ERROR.
   - A. The reservation was made as against Robert Morris, not as against the State of New York.
   - B. Admitting for the sake of argument that the reservation was made as against the State of New York, properly construed, it does not provide that the exercise of the right reserved shall not be subject to the police power of New York.
     - a. An unlimited right is not expressly reserved.
     - b. To infer an unlimited right from the language actually employed would be unreasonable and without precedent.
     - c. In Ward vs. Race Horse, 163 U. S. 504, similar to the case at bar, this court held that a treaty in which the Indians reserved the right to hunt upon the land ceded had left them amenable to the game laws of Wyoming.
     - d. United States vs. Winans, 198 U. S. 371, did not overrule Ward vs. Race Horse, but is distinguishable therefrom and consistent with the contentions of defendant in error.

ARGUMENT.

INTRODUCTION.

In determining whether these three Indians have the exemption from police regulation claimed for them, we must begin with perhaps the most fundamental conception in the entire common-law system,—the conception of territorial jurisdiction, which contemplates that every sovereign political unit has jurisdiction over everything and every person within its boundaries. The State of New York, except insofar as it has delegated its inherent powers to the United States, has the jurisdiction described, including jurisdiction over Indians, for the Federal Government is a government of delegated powers.

The People *ex rel.* Cusick vs. Daly, 212 N. Y. 183.
The Cherokee Nation vs. Georgia, 5 Pet. 1, 22.
Mitchel vs. United States, 9 Pet. 712, 745.
People vs. Dibble, 21 How. 366.
Dick vs. United States, 208 U. S. 340, 353.

New York, like the other states of the Union, has limited her inherent power over the persons and property of Indians by delegating to the Federal Government power "to regulate commerce * * * with the Indian tribes" (Fed. Const. Art. 1, Sec. 8). When, therefore, these three Indians claim an exemption from the Laws of New York by reason of some action on the part of the United States, it becomes necessary to make two inquiries. First, has the United States acted in the manner and to the effect contended? Secondly, if it has, did it have the power so to act? In the case at bar, the defendant in error contends that the first inquiry should be answered in the negative, hence deems it unnecessary to attempt an answer to the second.

We turn, then, to the proposition that **the treaty of Big Tree, properly construed, does not contain an engagement on the part of the United States that the Seneca Indians shall not be amenable to the Game Laws of the State of New York.**

DISCUSSION.

I. THE SO-CALLED TREATY OF BIG TREE WAS MERELY AN ORDINARY CONVEYANCE BY DEED.

If this transaction was a treaty, it was a treaty of cession, for it purported to convey land in the possession of the Seneca Nation. Now, in the case of a treaty of cession, we expect the party granting and the party receiving the grant to be sovereign states; or we expect one party to be a sovereign state, and the other to be, if not sovereign, at least some type of political organization, which may be either a civilized dependency or a barbarous or half-civilized tribe. But in the case of this treaty, if treaty it be, neither grantor nor grantee was a sovereign. The grantee was a private individual. And it has been said by the Supreme Court of the United States again and again that an Indian tribe does not possess sovereignty.

The Cherokee Nation vs. Georgia, 5 Pet., 1, 17, 22.
United States vs. Rogers, 4 How., 567, 572.
People vs. Dibble, 21 How., 366, 370.
United States vs. Kagama, 118 U. S., 375, 381.

Perhaps this conveyance would never have been called a treaty, had it not been for the fact that the United States in a measure was a party to it. But the United States participated because, under the Indian Intercourse Act, as plaintiff in error admits, its approval was necessary to give Morris a good title. It was said in Mitchel vs. U. S., 9 Pet., 712, 745:

> "Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete."

On numerous occasions the United States has made treaties with Indian tribes by the terms of which Indian lands were ceded to the United States; the treaty discussed in United States vs. Forty-three Gallons of Whiskey, 93 U. S., 188, is an example. But by the transaction at Big Tree, lands were conveyed not to the United States, but to Robert Morris. So far as the contracting parties are concerned, therefore, the transaction appears to be an ordinary conveyance rather than a treaty.

The nature of the subject matter of the grant points to the same conclusion. As we have said, the Indians had no sovereignty to convey, and we may add that even if they had, they would not—probably could not—have transferred that sovereignty to a private individual living under the jurisdiction of the United States. All they had was a right to the possession of the soil, the ultimate fee being in either the State of New York or the United States—we need not say which.

The Cherokee Nation vs. Georgia, 5 Pet., 1, 17.
Mitchel vs. United States, 9 Pet., 712, 745.
United States vs. Kagama, 118 U. S., 375, 381.

All that the grantee transferred was $100,000 in money. The transfer of a mere interest in real estate in exchange for money "sounds more" in ordinary conveyance than in treaty.

A similar inference is to be drawn from the language used by the parties. The document evidencing the conveyance purports to be an "indenture." It is in the form of a common deed. The reservation the effect of which is under discussion here was made in the words usually and customarily employed by private persons:

> "excepting and reserving to them, the said parties of the first part, * * * and their heirs, the privilege to fish and hunt on the said tract of land hereby intended to be conveyed."
>
> Kappler's Indian Treaties, 102.

The character of the contracting parties, the subject matter of the transaction, and the language employed by them, indicate that this grant, far from being a treaty in the proper sense of that term, was in fact the familiar conveyance of an interest in land by one individual or group of common owners to another individual.

II. IF THE TREATY OF BIG TREE WAS AN ORDINARY CONVEYANCE BY DEED, THE EXERCISE OF THE PRIVILEGE RESERVED WAS SUBJECT TO THE POLICE POWER OF THE STATE OF NEW YORK.

This goes almost without saying. If Smith conveys land to Jones, reserving the right to draw water, or to hunt, or to fish, upon the land conveyed, obviously the exercise of the right reserved is subject to the police power of the State. It is only by calling the transaction at Big Tree a treaty with the United States, or by claiming something ex-

traordinary for it by reason of the fact that one of the parties was an Indian tribe, that the plaintiff in error has any ground whatever to stand upon.

III. WHETHER THE TREATY OF BIG TREE WAS A TREATY IN THE PROPER SENSE OF THAT TERM, OR AN ORDINARY CONVEYANCE BY DEED, IT DOES NOT PURPORT TO GIVE THE EXEMPTION CONTENDED FOR BY PLAINTIFF IN ERROR.

Let it be recalled that the grantee was Robert Morris, a private individual. The grant was made to him, and therefore the reservation was made against him and those who should hold under him, and in derogation of the interest conveyed. The Senecas were willing to part with their right of possession, but they did not desire that, as soon as the new owner had title, he should turn to them and say: "It is true that you subsist largely by means of fishing and the chase; it is also true that the lands you are to occupy in the future have but a fraction of the area of the lands you have just conveyed to me; nevertheless, though my new land be but a wilderness and filled with fish and game, you cannot come upon it." In view of the fact that the reservation purports to be made as against an individual, imposing a servitude upon his land, it would be going a great way to hold that either the United States or the Senecas intended any reservation whatever as against the State of New York. The Senecas must have known that which was as true in 1797 as it is now, namely, that neither Robert Morris nor any other individual could exempt them from the laws of a state.

But let it be assumed that the defendant in error is wrong in arguing that the reservation clause was intended to affect only the grantee and his heirs or assigns. Let it be assumed that the plaintiff in error is correct in his argument that the United States and the Seneca Nation did intend this reservation clause to be operative even as against the State of New York. That assumption raises the question of the extent to which the power of the State of New York was intended to be limited.

One is first struck by the fact that there is no language stating expressly that the parties stipulated for a right having no limits whatever. There is no such phrase as "at all times," or "at all seasons of the year," or "in any manner desired by said party of the first part," or "any law or statute to the contrary notwithstanding." There is nothing

to prevent Morris or his grantees from hindering the Indians in the exercise of the right reserved by cutting the timber, and erecting houses, barns, fences, and other structures, which, like game laws, come with the advancing tide of civilization. There is nothing even to prevent Morris and his grantees from eventually rendering valueless the right reserved by gradually killing or frightening away all the game and catching all the fish. It would seem that if the parties had intended the Senecas to have a right greater than or different from the right enjoyed by the grantee and by other persons having a right to go upon the land conveyed, the express language employed would have given a hint of such intent.

Without any express language of the sort above referred to, this court is asked to infer from the language actually employed that the United States and the Seneca Nation agreed that the latter should have the right of exemption from that most fundamental of all powers reserved to the States, namely, the police power, and that these barbarous Indians, so lately at war with the settlers during the Revolution, should have a right far greater than that enjoyed by the grantee himself and the people of New York. It is respectfully submitted that to draw such an inference would be unreasonable and without precedent.

There is no doubt that this court has gone very far in sustaining the power of the United States to make treaties with the Indians or to enact statutes applicable to Indian lands and Indian affairs, which treaties and statutes often seemed to the persons contesting them to trench upon the power reserved to the States. Thus it was held that the United States had power to make treaties with the Cherokees, the effect of which was to prevent the State of Georgia from extending its laws over the Cherokee territory, within the boundaries of that State.

Worcester vs. State of Georgia, 6 Pet., 515.

That when the United States had stipulated by treaty with the Shawnees and other tribes that the lands of those tribes should be exempt from levy, sale and forfeiture, the State of Kansas could not tax the lands, even such parts of them as were owned by individual Indians in severalty.

The Kansas Indians, 5 Wall., 737.

See also The New York Indians, 5 Wall., 761.

That Congress had power to enact that liquor intended to be sold to the Indians should be forfeited, and that liquor so intended to be sold should be forfeited under the statute

even when found in a Minnesota municipality near, but not within, an Indian reservation.

United States vs. Forty-three Gallons of Whiskey, 93 U. S., 188.

That Congress had power to enact that liquor should not be sold to Indians, and that a conviction for violating this enactment in a Michigan county in which there was no Indian reservation should be sustained.

U. S. vs. Holliday, 3 Wall., 409.

That a conviction for violating a Federal statute forbidding the introduction of liquor into the Indian country should be sustained, even though the lands of the Indians were no longer held by the tribe, but were held in severalty, title to become absolute at the end of twenty-five years.

Dick vs. U. S., 208 U. S., 340.

See also U. S. vs. Pelican, 232 U. S., 442.

That Congress had power to enact that certain crimes committed by Indians upon reservations within a State should subject the offender to the Laws of the United States and to trial by its courts.

U. S. vs. Kagama, 118 U. S., 375.

That Congress had power to extend to the Indian country certain general Laws of the United States as to the punishment of crimes, and that even a white man was amenable to these laws when upon an Indian reservation in the State of California, and was triable by a Federal Court.

Donnelly vs. U. S., 228 U. S., 243.

That Congress had power to prohibit the introduction of liquor into the territory occupied by the Pueblo Indians in the State of New Mexico, even though the land of the Indians was owned in fee simple (by a communal title) and the Indians themselves were citizens of the State of New Mexico.

U. S. vs. Sandoval, 231 U. S., 28.

It will be observed that the question in each of the above cases was one of the extent of Federal power. In the case at bar, it might well be argued that the Federal Government had not the power to create the exemption contended for by plaintiff in error, but defendant in error has thought it unnecessary to enter upon that argument. Defendant in error does not attempt to answer the question of Federal power either one way or the other, for he believes that the Federal Government has not even *sought* to create or approve this exemption from the police power of the State of New York. Since our problem here is one of interpretation rather than of Federal power, the cases referred to in the

paragraph last above have no application, at least as an answer to the contentions of the defendant in error.

Perhaps the case of Ward vs. Race Horse, 163 U. S., 504, is nearer in its facts to the case at bar than is any other case decided by this court. Before the admission of the State of Wyoming, the United States made a treaty with the Bannock Indians, by which it was provided that the Indians should "have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." Later Wyoming was admitted as a State, and land covered by the treaty was included within its boundaries. Presently Race Horse, a member of the Bannock tribe, was arrested, charged with violating the game laws of the new State. It was held that Race Horse, despite the treaty, was amenable to the aforesaid game laws. The treaty was construed in the light of its terms, of the circumstances under which it was made, and of the statute admitting Wyoming to the Union, and it was decided that the Federal Government had not intended to give the Indians the unlimited right claimed for them. At page 509, in discussing the proposition advanced that the treaty made the Bannock Indians exempt from the Game Laws of Wyoming, the court said, by Mr. Justice White:

> "It would also render necessary the assumption that Congress, whilst preparing the way, by the treaty, for new settlements and new States, yet created a provision not only detrimental to their future well-being, but also irreconcilably in conflict with the powers of the States already existing."

At page 516, referring to the two cases of the Kansas Indians (*supra*) and The New York Indians (*supra*), Mr. Justice White continued:

> "Thus these two cases involved the authority of the State to exert its taxing power on lands embraced within an Indian reservation, that is to say, the authority of the State to extend its powers to lands not within the scope of its jurisdiction, whilst this case involves a question of whether where no reservation exists a State can be stripped by implication and deduction of an essential attribute of its governmental existence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the

public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States."

In the United States vs. Winans, 198 U. S., 371, the facts, briefly stated, were these: the United States had stipulated by treaty with the Yakima Indians that the latter should "have the right of taking fish at all usual and accustomed places in common with the citizens of the Territory" [Washington]. It was held that the respondents could not, under license from the State of Washington, operate a fish wheel in the territory covered by the treaty, in such a manner as to exclude the Indians from enjoyment of the rights reserved.

Plaintiff in error contends that the Winans case overruled Ward vs. Race Horse. It is submitted, however, that the two cases are clearly distinguishable. In the Race Horse case, a treaty was construed, and it was held that, under its terms, an Indian was still amenable to the Game Laws of the State of Wyoming. In the Winans case, a different treaty was construed, and it was held that, under a license to use a fish wheel, granted by the State of Washington, respondents could not exclude the Indians from lands to which they had been assured by the United States a limited right of occupancy. In the Winans case, the court below seems to have found (see page 380) "that the defendants have excluded the Indians from their own lands, to which a perfect absolute title has been acquired from the United States Government by patents, * * * and they claim the right to operate these fishing wheels, which necessitates the exclusive possession of the space occupied by the wheels." In view of this state of facts, if the court had believed that the license given by the State had been *intended* to confer the right contended for by respondents, it would still have been held only that the license of the State could not *destroy* a property right reserved by the Indians in a treaty with the United States. But the court did not go even to that extent, for it was said (p. 384) that the license "gives no power to them to exclude the Indians, nor was it intended to give such power," but was merely "the permission of the State to use a particular device." Hence, the actual holding of the case involved what the State *had done* rather than what the State *could do*. Admitting, however, that a question of State power was passed upon, the question involved the power of the State to *destroy* a prop-

erty right, rather than the power to *regulate* the enjoyment of that right. If the Race Horse case involved any question of State power, it was the power to *regulate*. That the court did not intend, in the Winans case, to reflect upon the authority of Ward vs. Race Horse is shown by a statement in the opinion that the treaty "did not restrain the State unreasonably, if at all, in the regulation of the right" (page 384).

The Winans case is also to be distinguished from the case at bar, for the conveyance made by the treaty discussed therein seems to have been made directly to the United States, hence the reservation was made as against the United States and in derogation of the property right transferred to that grantee. Also, if any question of State power was involved in the Winans case, it was a question of power to destroy a property right of the Indians and not of power to regulate it, which the State of New York has sought to exercise here.

If New York had not sought to exercise its police power to protect its game, the right which was given to the Senecas by the treaty of Big Tree must long since have ceased to be of any use or value whatever. The power of New York to protect the rights of Indians within its borders was affirmed in People vs. Dibble, 21 How., 366.

CONCLUSION.

IT IS RESPECTFULLY SUBMITTED THAT THE ORDER OF THE NEW YORK COURT OF APPEALS WAS RIGHT, AND SHOULD BE AFFIRMED, WITH COSTS.

Except insofar as New York has delegated its powers to the United States, it has jurisdiction over every person and every thing within its boundaries. New York was one of the original thirteen States. Hence its jurisdiction attached to the Indians before the adoption of the Articles of Confederation or the Federal Constitution. The Indians themselves, as shown by the cases cited, possessed no sovereignty, despite the fact that they were and are permitted a large degree of freedom in conducting the internal affairs of their tribes. If the Laws of New York do not attach to them, it must be because New York has assumed to act in a matter delegated to the Federal Government, or because the Federal Government has acted under its Constitutional power in such a manner as to take the Indians out of the operation

of State Laws. It is clear that New York has not assumed to act in a matter delegated to the Federal Government; game laws belong to the police power, which is reserved to the States. Has the Federal Government power to act in such a manner as to exempt three Seneca Indians from the police power of New York when the Indians are outside their reservation? Whether it has or has not such power, it has not sought to exert it in the treaty of Big Tree. The purpose and effect of that treaty was to transfer to Robert Morris the right of occupancy owned by the Indians in the land conveyed, and no party to the treaty, least of all the Federal Government, intended in any manner to limit the police power of the State of New York. The Senecas reserved as against their grantee, Robert Morris, the right to hunt and fish upon his land, but as soon as their right of occupancy was gone, if not before, the police power of New York was extended over the land conveyed. If, therefore, the Indians exercise the right reserved, they must exercise it in a manner consistent with the Game Laws of the State of New York. Morris must have done this if there had been game laws in his time, and his grantees must do it today. These three Indians undoubtedly have a right to hunt and fish upon another's land quite regardless of his permission. But if they do, if they assume to go beyond the limits of their reservation to enjoy the right owned by their tribe in the land of another, shall they be held to be above the law?

Respectfully submitted,

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